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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 86-6

In The
Supreme Court of the United States
October Term, 1986

JAMES G. RICKETTS, *et al.*,
Petitioners,

vs.

JOHN HARVEY ADAMSON,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 3, 1986
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

[Caption omitted]

JURY TRIAL, TWELFTH DAY:

MINUTE ENTRY OF JAN. 15, 1977

CHANGE OF PLEA:

11:15 a.m.: In open court:
Defendant present in custody.
Bruce Johnson reporting.

Mr. Friedl informs the court that the parties have reached a plea agreement and said written plea agreement is filed with the court.

Mr. Schafer files a letter dated January 14, 1977, to Hon. Ben Birdsall from William C. Smitherman, United States Attorney.

Also filed at this time are documents labelled Exhibit A and B to Plea Agreement, which documents are examined by the defendant and signed by him as being correct, and which are then sealed by the court and marked "To be opened only upon order of a Judge of the Superior Court," by order of the court.

Defendant verifies his signature on the Plea Agreement.

The court questions the defendant re his ability to enter into such a plea agreement.

The court advises the defendant re the nature of the crime of murder in the second degree.

The court questions the defendant re his understanding of each and every provision of the plea agreement.

Regarding Paragraph 5, Mr. Schafer states that there is another statement that was not taken by a court reporter but which was transcribed and is intended to be included by the parties.

Mr. Friedl states that the statement was given to defense counsel and that it is included by agreement of all parties.

Defendant states that this is his understanding.

Regarding Paragraph 12, the court questions counsel and each of them re the correctness of the statements in that paragraph and counsel and each of them state that the statements read by the court are true and correct.

Regarding Paragraph 13, the court reads into the record the letter from the United States Attorney filed this date.

Upon request of Mr. Feldhacker,

Mr. Schafer states that the documents the state provided to the U.S. Attorney for review were the transcribed statements referred to in the Plea Agreement: the statement given to defense counsel and the statement taken by the court reporter.

Regarding Paragraph 15, the court states that those matters (the transcribed statements and the testimony) could not be used against the defendant and would not be admissible if the plea is not accepted by the court.

The court advises the defendant of the constitutional rights he waives by entering a guilty plea, which rights are enumerated in Paragraph 17 of the Plea Agreement.

In response to questioning by the court, Mr. Adamson states that it is his desire to give up those constitutional rights.

Pursuant to Paragraph 18 of the Plea Agreement,

IT IS ORDERED that the defendant remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this Plea Agreement.

The attorneys and each of them verify their signatures on the Plea Agreement.

The court states that it will not sign the agreement this morning, and

IT IS ORDERED that that portion of the Plea Agreement will be "form filed" only and the court will sign and date that part of the agreement when the court has accepted all of the provisions of the agreement.

The court states that it has read and examined the Preliminary Hearing Transcript in this case and that it has read and examined (with the consent of all counsel) the police reports and the statements of all witnesses which have been taken and reduced to writing in connection with this particular case.

In response to questioning by the court, Mr. Adamson states how he was involved in the killing of Donald F. Bolles.

THE COURT FINDS that there is a factual basis for the defendant's plea of guilty to the crime of murder in the second degree.

The court questions the defendant re his satisfaction with the services of his court-appointed counsel and each of them.

The court advises the defendant of the provisions of the Arizona Rules of Criminal Procedure regarding the court accepting or rejecting the sentencing provisions of the Plea Agreement.

The court advises the defendant of his alternatives should the court reject the sentencing provisions of the agreement.

The court states that if it can accept the sentencing provision, the entire Plea Agreement will be accepted.

The court states that the Pre-Sentence report will be available to the court and counsel on January 18, 1977.

The court states that it will review the Pre-Sentence Report and will advise the defendant at a subsequent hearing whether or not the court is able to accept the sentencing provisions of the agreement.

IT IS ORDERED said hearing is set for January 19, 1977, at 10:00 a.m.

The court advises the defendant that he is entitled to have a pre-sentence report within two days prior to the date set for sentencing and in the event that is applicable in this case,

Messrs. Schafer, Feldhacker, and Adamson each state that they would waive that provision.

The court advises the defendant of his right to enter a plea of not guilty at this time.

The court questions the defendant re any promises made to him in connection with the plea agreement which are not contained in the written Plea Agreement or which have not been discussed in court this morning: Defendant states that there have been none.

The court questions the defendant re any force (either physical or verbal) or threats which induced him to enter into the plea agreement: Defendant states that there were none.

The court questions the defendant whether it is still his desire to plead guilty to the crime of murder in the second degree as set forth in the Plea Agreement and as introduced on the record this morning: Defendant states that it is his desire to do so.

THE COURT FINDS that the defendant's plea is made voluntarily with a full understanding of the nature of the charges to which he is pleading guilty and with a full understanding of the sentence he will receive as set forth in the Plea Agreement.

THE COURT FURTHER FINDS that the defendant's plea is made intelligently and that the defendant is competent to enter the plea.

THE COURT ACCEPTS the defendant's plea.

The court hands Prof. George W. Rige, Court/News Liaison, copies of the Plea Agreement to be distributed among the news people when the court recesses.

The court informs counsel that it is not going to discharge any of the jurors at this time; that the Jury Commissioner has been instructed to call all of the remaining jurors and tell them that they will not be needed at least until January 20, 1977.

12:10 p.m.: Prospective jurors reporting this date are brought into the courtroom, the clerk calls the roll (all 11 jurors are present), the jurors are admonished and excused subject to call.

12:15 p.m.: Court stands at recess.

FILED IN COURT: List of Jurors to report to Division IX, January 15, 1977; Plea Agreement (6 pgs); Exhibits A and B to Plea Agreement (sealed in envelopes); Letter to Hon. Ben Birdsall from William Smitherman (1 pg. + envelope).

cc:

Assistant Attorney General, William J. Schafer III

Maricopa County Deputy County Attorney, G. Eugene Neil

Martin, Feldhacker & Friedl

Maricopa County Court Administrator, Gordon Allison

Pima County Jury Commissioner, Teal A. Harris

Hon. Ben C. Birdsall

Pima County Sheriff

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

[Caption Omitted]

MINUTE ENTRY OF JANUARY 19, 1977

HEARING:

8:40 a.m.: In chambers:

Defendant not present.

Messrs. Neil and Friedl present.

Bruce Johnson reporting.

The court makes statements to counsel.

Mr. Friedl makes a statement to the court.

10:00 a.m.: In open court:

Defendant present in custody. All counsel present.

Bruce Johnson reporting.

James Muth, Maricopa County Adult Probation Officer, present.

The court states that it is not ready to proceed with this hearing at this time.

IT IS ORDERED the hearing is continued subject to call this date.

3:20 p.m.: In chambers:

Defendant not present. All counsel present.

Bruce Johnson reporting.

The court makes statements to counsel.

IT IS ORDERED that the court reporter's notes of the hearings held in chambers this date be sealed and placed in an envelope and delivered to the clerk of this court, the envelope to contain the language "To be opened and/or transcribed only upon order of a Judge of the Superior Court." (Clerk receives notes from court reporter.)

3:55 p.m.: In open court:

Defendant present in custody. All counsel present.

Bruce Johnson reporting.

James Muth, Maricopa County Adult Probation Officer, present.

The court having reviewed the Pre-Sentence Report and having considered further the Plea Agreement and all of the matters which have been before this court and the matters contained in the file in this case, the hearing in which the court accepted the defendant's plea of guilty to the crime of murder in the second degree, and the transcript of the Preliminary Hearing,

THE COURT FINDS that the provisions contained in the Plea Agreement regarding the sentence to be imposed upon the defendant are appropriate and the court will not reject those provisions and the defendant will be sentenced strictly in accordance with the provisions contained in the Plea Agreement.

IT IS ORDERED the sentencing date be subject to call.

IT IS FURTHER ORDERED the case is set for a Review Hearing on January 18, 1978. The court states

that counsel will be required to be present at that hearing, that the defendant is entitled to be present but the court would accept a written waiver of his presence if that is his desire. Further, counsel for either the state of [sic] the defendant will have the right to file a motion to set a date for sentencing in the event that both sides do not agree that the matter is ready for sentencing. The court states that if such a motion is filed, counsel are to follow the notice and time limit provisions of the Rules. Further, if counsel agree that the matter is ready for sentencing prior to the time set for the Review Hearing, counsel should so advise the court.

The court signs the Plea Agreement.

The court hands George W. Ridge, Court/News Liaison, copies of the Pre-Sentence Report to be made available to the news people at the conclusion of the hearing.

The court reads into the record the letter which will be sent to all of the remaining jurors.

4:10 p.m.: Court stands at recess.

FILED IN COURT: Plea Agreement, Jury List (Strike, 4 pgs), Exhibit List (Voir Dire), Request for Payment by Maricopa County for Services Rendered by KOOL Radio Television to Defendant.

FILED THIS DATE: Court Reporter's Notes of proceedings held in chamber on January 19, 1977 (sealed), Jury Service (sealed), Pre-Sentence Report.

cc:

Assistant Attorney General, William J. Schafer III

Deputy Maricopa County Attorney, G. Eugene Neil

Martin, Feldhacker & Friedl, 234 N. Central Ave, Suite 621, Phoenix, Arizona 85003

Maricopa County Court Administer, Gordon Allison
Maricopa County Adult Probation Office, Attn: James Muth

Hon. Ben C. Birdsall

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
[Caption Omitted]

MINUTE ENTRY OF DECEMBER 7, 1978

SENTENCING:

DATE OF OFFENSE: On or about June 2, 1976

Defendant present in custody.

Bruce Johnson reporting.

Defendant having pled GUILTY to the crime of MURDER IN THE SECOND DEGREE, and no legal reason being shown why judgment should not now be pronounced,

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY of that crime.

The Court states that the Defendant's sentence is being limited by the terms of the Plea Agreement which was entered in this case and which was previously accepted by the Court, and the Court is going to proceed with the sentence in accordance with the Plea Agreement.

Mr. Schafer states to the Court that it may be necessary to bring the Defendant back for further testimony after the sentencing.

IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the Defendant be sentenced to the custody of the Arizona State Department of Corrections for not less than forty-eight (48) nor more than forty-nine (49) years, to date from June 13, 1976, which is the date that the Defendant was first taken into custody on these charges.

The court states that the sentence is to be in accordance with paragraph number 13 of the Plea Agreement.

The Court advises the Defendant of his appeal rights. FILED IN COURT: Notice of Right to Appeal and Appeal Procedure.

The Court states that there is a sub-paragraph 11 in the Plea Agreement in regard to any appeal, and that form is further modified by that provision in the Plea Agreement.

IT IS ORDERED that the Defendant be remanded to the custody of the Pima County Sheriff.

/s/ Ben C. Birdsall
Judge

cc:

William J. Schafer, III, Attorney General's Office, Phoenix, Az.

William Feldhacker, Esq., 10211 N. 32nd St., Bldg. G, Phoenix, Az. 85028

Gregory Martin, Esq., 10211 N. 32nd St., Bldg. G, Phoenix, Az. 85028

Pima County Sheriff (2 certified copies)

Arizona State Prison (2 certified copies)

Arizona State Department of Corrections (2 certified copies)

Adult Probation in Phoenix

B. J. Davis—Main Office in Tucson

Hon. Ben C. Birdsall

Wilson D. Palmer, Maricopa County Superior Court, Clerk's Office

(Original is being sent to Mr. Palmer, plus a posting copy)

IN THE SUPERIOR COURT
OF MARICOPA COUNTY

Minute Entry of May 12, 1980

This is the time set for hearing Defendant's Motion to Quash Warrant and to Strike Pleadings. State is represented counsel, William Schafer. Defendant is represented by counsel, William Feldhacker.

Court Reporter, LoAnn Durby, is present.

LET THE RECORD SHOW defense counsel waives the defendant's presence at this hearing.

Motion is argued to the Court.

IT IS ORDERED taking this matter under advisement.

LATER:

Defendant's Motion to Quash Warrant and to Strike Pleadings having been taken under advisement and the

Court havin considered all memoranda submitted as well as oral arguments,

IT IS ORDERED Defendant's Motion is denied. Under *State v. Rise,* 99 Ariz. 14, 405 P2d 894 (1965) and *State v. John,* 97 Ariz. 27, 398 P2d 392 (1964), the Information filed is construed to be an amendment of the charges plead to in order to conform to the original charges.

FURTHER ORDERED the Stay, heretofore granted, is lifted.

FURTHER ORDERED the State's Order for Writ of Habeas Corpus Ad Prosequendum is granted and Order is signed by the Court this date.

FURTHER ORDERED that upon the Sheriff receiving the defendant, the Court Administrator's Office will schedule the Initial Appearance and then the Arraignment in the customary manner.

(p. 2) [Caption omitted]

[Change of Plea]
Tucson, Arizona
January 15, 1977

MORNING SESSION

The Court: This is Case No. CR-93385, Maricopa County, State of Arizona vs. John Harvey Adamson. This is the time set for continuing the voir dire examination of the jurors.

Is there anything to come before the Court?

Mr. Friedl: Yes, Your Honor. At this time the defense and the State of Arizona have reached a plea agreement and would like to approach the bench regarding that matter.

The Court: You may.

(Whereupon, a bench conference was had, to-wit:)

Mr. Friedl: I would at this time like to file the original plea agreement with the Court.

The Court: I'll have the clerk show it filed.

Anything further to be filed at this time?

Mr. Schafer: Yes, Your Honor. There are two exhibits, one labeled Exhibit A and one labeled Exhibit B, and a letter from the U.S. Attorney.

The Court: All right. Are these exhibits a (p. 3) part of the plea agreement?

Mr. Schafer: They are part of the agreement and they are referred to in the agreement as well as the letter.

The Court: All right. Have all counsel signed the letter?

Mr. Feldhacker: We have, Your Honor.

The Court: Defendant?

The Defendant: Yes, Your Honor.

The Court: All right. I'll have the clerk file the letter from the United States Attorney and that will remain open in the file.

Now, Exhibit A is unsealed and the Court is going to open it at this time and ask the defendant to examine it and see if it's correct and to sign his name to the sheet of paper if it is correct.

Then it will be handed to the clerk and be sealed and be opened only upon order of a Judge of the Superior Court.

(Whereupon, defendant signs a document.)

The Court: All right. That's been signed by the defendant in the presence of the Court in open court and I'm going to place it in the envelope, seal the envelope, and have this filed as an Exhibit A to the (p. 4) plea agreement with the instructions on the envelope that I gave you.

Now, I'm going to follow the same procedure with regard to Exhibit B. I have opened that and I'll hand Mr. Adamson the document that's inside the envelope, Exhibit B.

(Document handed to Mr. Adamson, who thereupon signs it.)

The Court: That's been signed by Mr. Adamson in open court.

I'm going to place that in the envelope, Exhibit B, and hand it to the clerk for filing, same instructions.

Now, would everybody stand back just a little bit because it's more comfortable to talk when you're back just a little bit.

(Open court.)

The Court: Mr. Adamson, I want to begin, sir, by saying to you that the Court has before it this written plea agreement and I have had an opportunity to read it before coming into court this morning.

I want to advise you, sir, that except as set forth in the plea agreement, if the Court accepts your plea and the plea agreement this morning, subject only to the matters that are set forth in the plea (p. 5) agreement, and subject also to the fact that the plea agreement contains provisions regarding your sentencing which the Court will still have an opportunity to reject, and I'm going to explain that to you during the proceedings, if you enter this plea this morning the plea is entered and it cannot be withdrawn.

Do you understand that, sir?

The Defendant: I do.

EXAMINATION

By the Court:

Q. Mr. Adamson, how old are you?

A. Thirty-three years old, sir.

Q. And how much formal education have you had?

A. Sixteen years.

Q. Sixteen years?

A. Yes, sir.

Q. That would be—

A. Through college, I believe.

Q. You are a college graduate.

A. No, sir. I never graduated.

Q. But you did have four years of college.

A. Yes, sir.

Q. Have you ever had any mental illness or disease?

A. No, sir.

(p. 6) Q. Are you under the influence of any drugs or alcohol or anything else here this morning?

A. No, sir.

Q. The Court does understand that you have been taking tranquilizers; is that correct?

A. Yes, sir.

Q. And you are still taking that?

A. Yes, sir.

Q. Does that in any way affect your ability to understand or comprehend what is going on here this morning?

A. No, sir.

Q. Mr. Adamson, you initially plead not guilty to the charge of murder in this case, specifically to the charge that you murdered Donald F. Bolles on or about June 2, 1976, in Maricopa County, Arizona.

I now have before me this plea agreement in which you are agreeing to plead guilty to murder in the second de-

gree. I want to go through the plea agreement with you, I want to make certain that you understand everything that is in it, and if you have any questions I want you to speak up, sir, and tell the Court.

A. All right.

Q. First, I want to tell you that the nature of the crime of murder in the second degree is the unlawful (p. 7) killing of a human being with malice, and malice is defined as having the intent to kill.

Do you understand, sir, that that is the nature of the charge that you are pleading guilty to?

A. I do.

Q. All right. And in this particular case that this is murder in the second degree, the murder of Donald F. Bolles on or about June 2, 1976, in Maricopa County, Arizona.

A. That is correct, sir.

Q. The plea agreement—we have got six pages of it, counting all the signatures—have you, sir, read that plea agreement?

A. I have.

Q. And is this your signature on Page 5 of the original of the plea agreement?

A. It is.

And have you gone over this plea agreement, sir, with your counsel?

A. I have.

Q. And were all three of them present at that time?

A. They were.

Q. At this point do you believe that you understand the provisions of the plea agreement?

A. Entirely, sir.

(p. 8) Q. Do you have any questions that you want to ask me about it before we go any further?

A. No, sir.

Q. All right. Now, the second paragraph of the plea agreement sets forth the statutory range of sentence for murder in the second degree and says that that is probation if no sentence is imposed and ten years—not less than ten years, and it could be up to life, if sentence is imposed.

The third paragraph of the agreement contains a provision with regard to the sentence which counsel and yourself, I take it, have agreed will be imposed in this case.

I would like to go through that with you next, sir.

The agreement provides that you shall receive a sentence of not less than 48 years and not more than 49 years imprisonment in the Arizona State Prison—and I'll cover that with you later—the sentence to commence June 13, 1976.

It then goes on that the parties agree that the defendant shall be incarcerated for a total of 20 calendar years and two calendar months and that the sentence, the minimum of 48 years and the maximum of 49 years, when computed with the statutory credits that are (p. 9) provided for under our law, will not permit you to complete the service of the maximum sentence of 49 years until that time has passed, that is, 20 years and two calendar months.

The agreement provides that you will be incarcerated for no longer than 20 years and two calendar months.

Further, it provides that you will not apply for or be eligible for parole until 20 calendar years and two calendar months have passed.

Now, let me say to you, sir, in that regard that it is the Court's understanding of the law that except for this provision in the agreement you would have been eligible under this sentence to apply for parole at an earlier time. You are giving up that right as part of this agreement.

Do you understand that, sir?

A. I do, sir.

Q. The agreement provides that in the event you do apply for parole prior to the 20 years and two months, that the agreement would be null and void and the original charges would be reinstated automatically against you.

In that same paragraph it's agreed that if for any reason the statutory time credits the defendant earns while incarcerated are taken away from him through (p. 10) no fault of his, including time spent in protective custody, whether requested by the defendant or ordered by the authorities, the sentencing court will recompute the length of the sentence so that the defendant will not be incarcerated for any period longer than 20 calendar years and two calendar months.

Now, the Court understands that means that in the event that some of the credits to which you would be entitled under the computation that has produced the 20 years and two months were taken away from you without you having done anything wrong, that you would come back

into court and your sentence would be—there would be a new sentence pronounced and that that sentence would be such, sir, that you would be released within 20 years and two months, that is, having completed that total time.

Is that the way you understand that, sir?

A. That is my understanding, sir.

Q. Paragraph 4 of the plea agreement, the defendant hereby agrees to testify fully and completely in any court, state or federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles and in the beating of Leslie Baros at the Sheraton, Scottsdale, Maricopa County, Arizona, and any and all of the parties involved in the crimes listed in Exhibits A and B filed with this court as part (p. 11) of the agreement this date. Now, those are the exhibits that we just went through.

The contents of crimes and persons listed in Exhibits A and B shall remain sealed from public view until all of the individuals listed therein have been taken into custody or until they have had charges filed against them or until the State agrees that the contents be made public.

Those are the envelopes that we have filed with the clerk of the court.

Let me ask you, sir, if there is anything about that Paragraph 4 of the plea agreement that you have any question about?

A. No question, Your Honor.

Q. Paragraph 5 provides that you will testify truthfully and completely at all times whether under oath or not to the crimes mentioned in this agreement.

This shall include all interviews, depositions, hearings and trials. Should you refuse to testify or at anytime testify untruthfully, if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges in this case would again be automatically reinstated.

(p. 12) Do you understand that part of Paragraph 5 so far?

A. Yes, sir.

Q. These statements that that makes reference to are statements that the Court understands you have given since you were transferred here to Pima County and they were taken by a court reporter and have been transcribed.

Is this the way you understand it?

A. Yes, sir.

Mr. Schafer: Your Honor, may I interrupt a moment?

The Court: Yes.

Mr. Shafer: There is another statement that was not taken by a court reporter, but which was intended to be — by all parties intended to be included in here. That was transcribed, but not by a court reporter.

Mr. Friedl: Those were statements that Mr. Adamson gave to his counsel, Mr. Feldhacker, Mr. Martin and myself.

Q. (By the Court) That is included when we talk about statements. Do you understand that, Mr. Adamson?

A. I do.

Q. Now, the agreements — then the rest of Paragraph 5 then sets forth that the defendant will be subject to the charge of open murder and if found guilty (p. 13) of first degree murder to the penalty of death or life imprisonment requiring a mandatory 25 years actual incarceration and the Court shall be free to file any charges not yet filed as of the date of this agreement.

That, sir, is what would happen in the event that this agreement became null and void for any reason and the charges were then reinstated. Do you understand that?

A. Yes, sir.

Q. Now, Paragraph 6 contains what I think I can categorize as some promises made to you.

It reads the parties agree that the State will not prosecute the defendant for the following crimes, I'm going to go through these and read these to you, sir.

Those he will testify to which are mentioned in this agreement and listed in Exhibits A and B which are a part of this agreement.

Those where the defendant's involvement is presently known to the police and the subject of police reports.

Those which are material to the correct testimony of the defendant in relation to the crimes listed in this agreement and Exhibits A and B.

Those crimes which the defendant has revealed to the State in transcribed statements and those (p. 14) presently filed and now pending against the defendant.

The pending cases against the defendant in the Maricopa County Superior Court will be dismissed with prejudice at the time of your sentencing.

The defendant is to be severed in those cases from any other defendants.

Is there anything, sir, in Paragraph 6 as I have read it to you and explained it that you do not understand?

A. I understand everything you have read and explained, Your Honor.

Q. Paragraph 7, the parties agree that the defendant will not testify to any of the matters referred to in this agreement until Judge Birdsall has accepted all the terms and conditions of this agreement.

That's self-explanatory, I think. Anything about that, Mr. Adamson, that you do not understand?

A. I understand that, Your Honor.

Q. Paragraph 8, all parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibit A and B, which accompany it.

Now, you understand, sir, that you are entitled under our Rules of Criminal Procedure to be (p. 15) sentenced within 30 days from the date of the acceptance of your plea agreement and by this provision in the agreement you are waiving that time for sentencing and agreeing that the sentencing may occur at some date in the future when all of your testimony in the various cases has been accomplished. Do you understand that?

A. I do, Your Honor.

Q. Are you willing, sir, to so waive that time?

A. I am.

Q. Paragraph 9. The parties agree that in case of the resignation or death or incapacitating illness of the Judge assigned to this case — that's myself at the present time — any Superior Court Judge assigned for that purpose by the Presiding Judge of Maricopa County may sentence the defendant in accordance with the terms of this agreement and thereby be bound by the terms of this agreement.

Anything about that, sir, that you have any question about?

A. No, sir.

Q. Paragraph 10 provides that the sentencing, your sentencing, may be in any court house in any county seat or any other place designated by the sentencing judge in the State of Arizona in accordance with Arizona Rules of Criminal Procedure and Arizona Revised Statutes (p. 16) Section 12-130-C.

That, sir, is a statute that provides that the court can be held anywhere in the county if so designated by a judge.

Do you understand that paragraph, sir?

A. I do.

Q. Paragraph 11 provides that you will not appeal from the judgment and sentence entered herein except as may be necessary to recompute your sentence to insure that you be incarcerated not longer than 20 calendar years and two months.

If you should appeal from this plea agreement, except as noted herein, then the plea agreement would be null and void and all the original charges reinstated. Do you understand that?

A. I do, Your Honor.

Q. Paragraph 12, I'm going to read verbatim.

It is understood by all parties at this time, and at all times in the past, that the only party with full authority to enter into any plea negotiations with you has been William J. Schafer III of the office of the Arizona Attorney General, and that any offers alleged to have been tendered by any member of the office of the Maricopa County Attorney, and specifically Mr. Donald W. Harris, were made without authority. It is (p. 17) specifically denied by counsel for the defendant that Donald W. Harris ever made any firm offer of ten years actual incarceration to the defendant in exchange for a plea of guilty.

Mr. Adamson, do you have any question about Paragraph 12 as I have just read it to you?

A. No, sir.

The Court: Now counsel for the defendant, you have each signed the plea agreement. Since this paragraph makes specific reference to you, I'll ask each one of you if the statement read by the Court is true and correct.

Mr. Feldhacker.

Mr. Feldhacker: That being true and correct.

The Court: Mr. Martin.

Mr. Martin: That is true and correct.

The Court: Mr. Friedl.

Mr. Friedl: That is true and correct, Your Honor.

The Court: All right.

Mr. Friedl: Would you care to verify that with the attorney general and the county attorney who are here?

The Court: Mr. Neil?

Mr. Neil: That is correct, Your Honor.

The Court: Mr. Shafer.

Mr. Schafer: Yes, Your Honor.

(p. 18) Q. (By the Court) Paragraph 13 concerns federal immunity. It says that any federal immunity for you, sir, will be in accord with a document from the U.S. Attorney filed with the Court on this date. I will ask the clerk to hand me that document.

I think I'll read it, sir, and ask you if this is the way that you understand it.

It's addressed to me, the title of the case, dated January 14, 1977. To the extent that John Harvey Adamson's statements made to the State, which have been transcribed and read by this office, constitute a violation of the laws of the United States, the defendant, John Harvey Adamson, is granted immunity from prosecution. Signed by William C. Smitherman, United States Attorney.

Is that the immunity which you understood, sir, you would receive as part of this plea agreement from the federal authorities and is it satisfactory?

A. It's what I understood I would receive and it is satisfactory, Your Honor.

Mr. Feldhacker: Your Honor, as to that document, I would ask if the State would make a comment for the record as to what documents they actually provided to the U.S. Attorney for their review.

Mr. Schafer: We provided, Your Honor, before that letter was sent, the same statements, transcribed (p. 19) statements, that have been referred to in the plea agreement.

One statement consists of a transcribed statement taken by the court reporter.

The other consists of a transcribed statement that was given to the three attorneys before the statement given to the court reporter.

The Court: Satisfactory?

Mr. Feldhacker: That was my understanding, Your Honor, yes.

Q. (By the Court) Paragraph 14 provides that you will serve the agreed upon sentence in a prison outside the State of Arizona.

Paragraph 15 — I take it, sir, that that's satisfactory with you and in fact what you want.

A. Yes, sir.

Q. Paragraph 15, in the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement. I understand that to mean, sir, that you would be facing the

charge of open m der as you were when you first came into this court.

A. Yes, sir.

Mr. Schafer: Your Honor, I think it's also known by all of us, but we would also be in the same (p. 20) position as we were with reference to the transcribed statements that Mr. Adamson gave.

Mr. Friedl: And any testimony he would have given.

The Court: Yes, that those matters could not be used against him.

Mr. Friedl: Correct, Your Honor.

Q. (By the Court) And that is provided in our law, that the statements given by you during the plea negotiations are not admissible against you if the plea agreement is not accepted by the Court.

Item 16, unless the plea is rejected or withdrawn, the defendant hereby gives up any and all motions, defenses, objections, or requests he has made or raised or could assert hereafter to or against the court's entry of judgment and imposition of sentence upon him consistent with this agreement.

Do you understand that, sir?

A. I do.

Q. I'll repeat to you again at this point that if the plea is accepted here this morning, except for the matter of recomputation of sentence, the plea cannot be withdrawn. I say that because the language withdrawn is used in that paragraph.

Do you understand that?

(p. 21) A. I understand it, Your Honor.

Q. Now, the rejected part of it, I think that refers to the sentencing provisions and I'm going to completely go through that with you a little later.

Paragraph 17, if the Court accepts your plea of guilty as set forth in this plea agreement to the crime of murder in the second degree, there are certain constitutional rights which you are waiving and they are set forth here in Paragraph 17.

I want to go over them with you at this time, sir, and make sure that you understand them and that you further understand that by entering a plea at this time you are waiving those rights.

First of all, you have a right to a speedy public trial by a jury. And we have been sitting here for into the third week going through the jury selection process.

Secondly, you are entitled to confront the witnesses that appear to testify against you and to cross-examine them, and to cross-examine them with the assistance of your counsel.

Third, you have the right in the trial of the case, but no obligation to do so, to present evidence in your own behalf and to compel the attendance of witnesses through court process and to have them required (p. 22) to attend.

Fourth, you have the right to be represented by counsel at all times during the trial of the case and by counsel appointed for you at the cost of the—in this case Maricopa County—if you can't afford to employ counsel.

Lastly, you, sir, have the right to be a witness in the case yourself if you desire to be a witness. On the other hand, you have a right to remain silent and not testify as a witness unless you decide to do that. And you have the complete right to remain silent and not answer any questions concerning the charges against you.

You have the presumption that you're innocent unless and until you are proven guilty beyond a reasonable doubt.

Now, on the matter of testifying as a witness or remaining silent, I want to advise you. sir, you, of course, have the right to the advice of your court-appointed counsel in making a decision on that particular point.

Mr. Adamson, do you understand these constitutional rights, do you understand that you're giving them up if the Court accepts your plea of guilty here today?

A. Yes, sir.

(p. 23) Q. Is it your desire to give up these constitutional rights?

A. It is.

Q. All right. The plea agreement last provides the defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.

The plea agreement then reads, I, John Harvey Adamson, have read this agreement with the assistance of counsel, understand its terms, understand the rights I give

up by pleading guilty in this matter, and agree to be bound according to the provisions herein.

It's dated January 15, 1977, and your signature, which you have already acknowledged.

The last page we have discussed, this case and the plea agreement with the defendant, we have advised him of his rights and the conditions of his plea and we concur in his entry of this plea. That's dated January 15, 1977.

Mr. Friedl, is this your signature on the top line?

Mr. Friedl: Yes, it is, Your Honor.

The Court: And, Mr. Martin, is this your (p. 24) signature on the second line?

Mr. Martin: Yes, it is.

The Court: And, Mr. Feldhacker, your signature on the third line?

Mr. Feldhacker: It is, Your Honor.

The Court: We have reviewed this agreement and agree on behalf of the State of Arizona that the terms and conditions set forth herein are appropriate and are in the interests of justice. Dated January 15, 1977.

Mr. Schafer, is this your signature on the first line?

Mr. Schafer: Yes, it is, Your Honor.

The Court: Mr. Eugene Neil, is this your signature on the second line?

Mr. Neil: Yes, Your Honor.

The Court: Now, the last part of that page contains this language.

The Court has read all of the provisions of this agreement and accepts them. There is a date line and a signature line for my signature.

The Court is not going to sign this agreement this morning and it will be filed as the plea agreement, but that portion of it will be filed only and the Court will sign and date that part of the plea agreement when the Court has accepted all of the (p. 25) provisions of the agreement and not until then.

Now, Mr. Adamson, first, I want the record to show that the Court has read and examined the preliminary hearing transcript in this case, the hearing before the Justice of the Peace where you were bound over for trial to the Superior Court.

In addition, the record should show that the Court has examined and read during the last couple of weeks, with the consent of all counsel, the police officers' reports, supplements, and the statements of all witnesses which had been taken and reduced to writing in connection with this particular case.

Q. (By the Court) At this time, sir, I want to ask you—and this is in order to further establish a factual basis for your plea of guilty to the crime of murder in the second degree—I want you to tell the Court, sir, just what you did in connection with the death of Mr. Donald F. Bolles.

A. On June 2, 1976, in the parking lot of the Clarendon Hotel I placed a bomb containing dynamite underneath the vehicle driven by Don Bolles to be detonated

at a later time with the express purpose of killing him. And he died 11 days later subsequent to that explosion.

Q. Did you bring the bomb yourself to the automobile?

(p. 26) A. I did.

Q. And as I understand it, you placed it under the car.

A. That's correct, Your Honor.

Q. And did you, sir, do anything with reference to getting Mr. Bolles to the Clarendon Hotel on that date?

A. I did, sir.

Q. And what if anything did you have to do with reference to instructing anyone concerning the discharge of the bomb?

A. I made a phone call to an individual and told him where Mr. Bolles would be at a specific time and to—where—where it was arranged that the bomb was to be detonated.

Q. Did you, sir, do anything to advise the individual when the bomb was to be detonated? That is, when Mr. Bolles was going to enter the car?

A. Yes. But—yes, I did.

Q. What did you do in that regard, sir?

A. Well, the conversation ensued prior to Mr. Bolles arriving at the Clarendon House. It was arranged what was—was to be done after he left Clarendon House and entered his car.

And that's when the explosion was to occur.

Q. When he left the Clarendon House and returned (p. 27) to his automobile where the bomb had already been placed by you; is that right?

A. Yes, sir.

Q. You said this to me, but I want to make sure that I understand you correctly. You procured the bomb, you took it to the car, you put it under the car, and you made arrangements to have it detonated all with the specific intent to kill Mr. Bolles; is that right?

A. Yes, sir.

The Court: All right. Let the record show that at this time the Court finds that there is a factual basis for the defendant's plea of guilty to the crime of murder in the second degree.

Q. (By the Court) Mr. Adamson, you have been represented in this case since the beginning by three court-appointed attorneys.

Let me ask you, first, sir, if you are satisfied with the legal representation which these attorneys have given to you in this case?

A. In every way, Your Honor.

Q. Specifically, Mr. William H. Feldhacker. Are you satisfied with the legal representation which he has individually given to you in this case?

A. I am.

Q. Mr. Gregory Martin, are you satisfied with the (p. 28) services that he has given you as another one of your attorneys in this case?

A. I am, Your Honor.

Q. And are you satisfied, sir, fully with the services given to you by way of legal representation by Mr. William J. Friedl?

A. I am, Your Honor.

Q. Do you have any complaints at all concerning the manner in which they have represented you as your attorneys in this case?

A. Absolutely none.

Q. Is there anything that you have suggested to them by way of investigation or leads or talking to witnesses or anything of that nature that you have any complaint about?

A. None whatsoever.

Q. All right. Now, Mr. Adamson, this plea agreement contains a specific provision as to what your sentence is to be.

We have a Rule of Criminal Procedure which covers this kind of a situation and I want to go over the material part of that rule with you at this time.

The rule provides that the parties may negotiate concerning and reach an agreement on any aspect of the disposition of the case. The Court shall not (p. 29) participate in any such negotiation.

I want to go on the record at this time that the Court has not participated in any plea negotiations with reference to this case.

Mr. Adamson, do you have any reason to believe anything to the contrary?

A. I have no reason to believe anything to the contrary, Your Honor.

The Court: Counsel, is the Court's statement correct?

Mr. Schafer: It is correct.

Mr. Feldhacker: It is, Your Honor.

The Court: I take it Mr. Schafer and Mr. Feldhacker speak for all of you?

Subparagraph D of the rule that I'm going over with you provides that after making certain determinations, and those are determinations that you understand and agree to the terms of the plea agreement, and that the plea is entered in conformance with the other provisions of our law, the Court shall either accept or reject the tendered negotiated plea, and I'm going to do that, sir, here this morning.

It then provides, the rule provides, the Court shall not be bound by any provision in the plea agreement regarding the sentence if, after accepting (p. 30) the agreement and reviewing a presentence report, it rejects the provision as inappropriate.

Now, to put that in my own words, sir, and explain what that part of the rule so far means to you, it means the plea agreement provides that you will be sentenced to not less than 48 nor more than 49 years at the Arizona State Prison commencing this date.

If the Court after receiving a presentence report believes that that sentence is inappropriate, the Court has a right to take some action in that regard. And what the Court would do at that time, if the Court found that the sentencing portion of the agreement was not satisfactory, would be to give you, sir, an opportunity to withdraw your

plea and at the same time to advise you that if you permit the plea to stand that the disposition of the case might be less favorable to you than that contemplated by the agreement.

If you then, sir, did withdraw your plea, upon your request I, as the Judge, would disqualify myself from any further participation in this case.

Now, to explain that a little more fully, Mr. Adamson, I have already commenced having a probation officer from Maricopa County given the preparation of a presentence report for the Court. In connection with that, he has in fact interviewed you and I believe that (p. 31) you knew that is what he was doing, that was the purpose of the interview.

A. That is correct, Your Honor.

Q. I will have presentence reports available to me and available to your counsel and by that reason available to you on Tuesday of next week. That would be Tuesday, January the 18th.

I am going to set a hearing in this matter for Wednesday morning, January the 19th, at 10:00 a.m. I am going to review the presentence report and expect to be able, and if I'm able at 10:00 a.m. on Wednesday, the 19th, advise you whether or not the Court is able to accept the sentencing provisions in the plea agreement.

If the Court can accept the sentencing provisions in the plea agreement, then the entire plea agreement will be accepted.

If the Court cannot, then I would follow the procedure I have outlined in the rule.

Do you understand all of that?

A. I do, Your Honor.

Q. All right. By the way, you are entitled, under our rules, to have a presentence report within two days prior to the date set for sentencing. You, of course, are not actually going to be sentenced on Wednesday, January the 19th, but in the event that that two-day rule (p. 32) is applicable, I'm going to ask counsel and the defendant if they waive that portion of the rule.

Mr. Schafer: We do, Your Honor, the State.

Mr. Feldhacker: We do on behalf of the defendant, Your Honor.

The Court: Mr. Adamson?

The Defendant: Yes, sir, I do, also.

Q. (By the Court) The rule says that I should advise you at this time of your right to plead not guilty.

You understand, sir, that I haven't accepted the plea yet and you still have a right to continue with your plea of not guilty?

A. I do, sir.

Q. Now, I have gone over this plea agreement with you and I'm going to ask you, sir, if there have been any promises of any kind whatsoever made to you in connection with this plea which are not contained in this plea agreement or which we have not discussed openly here in court this morning?

A. No, sir, there have not been.

Q. Are you certain of that, sir?

A. I'm positive of it, sir.

Q. All right. Let me ask you next if there is anyone, attorney, police officer, anybody else, who has in any way forced you to enter into this plea agreement?

(p. 33) A. No, sir.

Q. Either physically or through any kind of verbal persuasion?

A. No, sir.

Q. All right. Next, let me ask you if there is anyone at all, attorney, law enforcement officer, anyone else, who has made any threats upon you, sir, which have in any way resulted in your making this plea agreement?

A. No, sir, there haven't been no threats of any kind.

Q. When I was advising you, sir, of the constitutional rights that you are waiving by reason of making this plea agreement, there may be one that I omitted and I'm going to cover it right now just to make certain.

Did I advise you, sir, that you have a right to be represented by your court-appointed attorneys at all times throughout the course of the trial? I think I remember now that I did.

A. You did and I understand it.

Q. You understand that.

A. I do.

The Court: All right. Counsel for the State, except for making some findings, is there anything that you think the Court has omitted?

(p. 34) Mr. Shafer: I don't think so, Your Honor.

The Court: Counsel for the defendant?

Mr. Feldhacker: Nothing that I am aware of, Your Honor.

The Court: All right. Mr. Adamson, is it still your desire, sir to plead guilty to the crime of murder in the second degree as set forth in the plea agreement and as we have discussed it here on the record this morning?

The Defendant: It is, Your Honor.

The Court: Do you have any questions of any kind that you want to ask me about the plea agreement or about the entry of the plea?

The Defendant: No, Your Honor, I have no question.

The Court: The Court finds that the defendant's plea is made voluntarily with a full understanding of the nature of the charge to which you are pleading guilty, with a full understanding of the sentence which the plea agreement sets forth that you will receive, that it is made intelligently, and that the defendant is competent to enter the plea.

The Court is going to accept at this time the defendant's plea to the charge of murder in the second degree and the Court will set 10:00 a.m., Wednesday, (p. 35) January 19th, as the time for further proceedings in this matter.

Is there anything further that counsel or the defendant have to come before the Court?

Mr. Schafer: No, Your Honor.

Mr. Feldhacker: Nothing from the defense, no, Your Honor.

Mr. Friedl: No, Your Honor.

The Court: Will you be seated.

(Whereupon, the Court proceeded with other matters.)

(p. 36)

Tucson, Arizona
January 19, 1977

The Court: Case No. CR-93385, State of Arizona vs. John Harvey Adamson.

The record may show that defendant and counsel are all present.

The Court is not ready to proceed with this matter at this time and it's going to be continued subject to call today.

We'll stand at recess.

(Whereupon, court recessed at 10:01 a.m.)

(Open Court at 3:50 p.m.)

The Court: The Court apologizes, ladies and gentlemen, for the delay which we have had today.

The Court was attempting to check out last minute information which might have pertained to this hearing.

The Court has received a presentence report. It was received yesterday and the Court has reviewed that report.

May the record show that each counsel has received a copy of that report.

Mr. Schafer: That's true, Your Honor, we have.

(p. 37) Mr. Feldhacker: We have, Your Honor.

The Court: Very well. Having reviewed that report and having considered further the plea agreement and all of the matters which have been before this Court, and the matters contained in the file in this case, the hearing in which the Court accepted the defendant's plea of guilty to the crime of murder in the second degree last Saturday, the transcript of the preliminary hearing which the Court read, the Court finds that the provisions contained in the plea agreement regarding the sentence to be imposed upon the defendant are appropriate and the Court is not going to reject those provisions.

The defendant will be sentenced strictly in accordance with the provisions contained in the plea agreement.

Now, the sentencing date will be subject to call. However, we have a policy and a practice in this court that we never leave any criminal case pending on a subject-to-call basis and the Court is going to set a review hearing in this matter for one year from this date, January the 18th, 1978.

The purpose of this being, I know that it would not happen in this case, but the purpose of this policy and practice being so that we will not lose any criminal cases or any defendants. We had that experience (p. 38) once and that's when this policy was adopted.

Counsel will be required to be present at that hearing. The defendant is entitled to be present at that hearing. The Court would accept a written waiver of the defendant's presence for that hearing if that's what is desired.

The purpose of the hearing is to advise the Court as to what progress has been made in the case and to advise the Court in this instance as to when the sentencing date might be set.

Now, in addition to that, counsel for either the State or the defendant will have the right to file a motion to set the date for sentencing the defendant. This is in the event that you do not agree that the matter is ready for sentencing.

If such a motion is filed, you are to follow the notice and time limit provisions of the rules.

If counsel do agree prior to the date of the review hearing that the matter is ready for sentencing, you can jointly advise the Court in any manner you wish informally, if you so desire, that the sentencing date should be set.

Do counsel have any questions concerning this?

Mr. Schafer: No, we have no questions, Your (p. 39) Honor.

Mr. Feldhacker: Yes, Your Honor. The only question is if Your Honor has placed your signature on the plea agreement as having been accepted.

The Court: I have done so at this time and I'm handing it back to the clerk.

I want to commend the probation officer who prepared the presentence report, Mr. Jim Mooth, I think, with the Maricopa County Adult Probation Department.

Knowing that there would be—this is a public document and knowing there would be interest in the report,

I have prepared copies of the report and I'm going to give them to Mr. Ridge at the conclusion of this hearing, I'll give them to you right now, and he'll make them available to the news persons.

I wanted to take this opportunity to thank Mr. Ridge for acting as the Court's liaison with the news persons during the proceedings in this case and I want to thank the news people for the cooperation which you have given to him and to the Court.

I know that we did not have a trial in this case and did not even complete the jury selection, but the case has presented considerable strain upon the court personnel involved and I want to thank my own staff, both in the courtroom and outside of the courtroom, for the (p. 40) extra effort that they have put forth with regard to the case, including the courtroom clerk.

I'm going to permanently excuse all of the jurors who have not heretofore been excused and I have written a letter which is gong to go to all of the remaining jurors and I would like to read that letter into the record.

Dear Juror, re State vs. Adamson. All of the jurors in this case are now permanently excused since the defendant entered a plea of guilty to the charge of murder in the second degree. You should not think your time was wasted since it was your presence and availability that made this possible. As the trial judge I was deeply moved by the willingness of so many jurors to make personal sacrifices in order to perform their civic responsibility as a juror. You might be interested in knowing that it has been my prior experience as a judge with jurors, but it never ceases to amaze me that it's so relatively easy

for us to get persons of your caliber who recognize the need for doing this. I'm sorry so many of you were kept waiting so long and so many different periods of time, but that was also necessary.

I want to also thank the Pima County Sheriff's Department for the security that they have provided during this proceeding, these proceedings. I (p. 41) think it's been excellent and I hope everyone recognizes that they have also put in extra time and gone out of their way to do this.

If I have omitted anyone, I'm sorry.

Is there anything further to come before the Court?

Mr. Schafer: I don't believe so, Your Honor.

Mr. Friedl: No, Your Honor.

The Court: All right. We stand at recess.

(Whereupon, court recessed at 4:10 p.m.)

(p. 42) Sentencing
Tucson, Arizona
December 7, 1978

The Court: In the Superior Court of the State of Arizona in and for the County of Maricopa, Case No. CR-93385, State of Arizona vs. John Harvey Adamson.

This is the time set for sentencing.

Would you come forward, please.

Mr. Adamson, first of all, I want to ask you if you are satisfied with the legal services that your attorneys have given you in this case?

The Defendant: Yes, sir.

The Court: Thank you. Mr. Adamson entered a plea of guilty in this court to the crime of murder in the second degree.

Is there any legal cause to show why judgment should not now be pronounced?

Mr. Feldhacker: There is none, Your Honor.

The Court: All right. No legal cause appearing, it the judgment of the Court that the defendant is (p. 43) guilty of that crime.

I'll hear from you now with regard to the sentencing.

Mr. Martin: We have nothing to say.

Mr. Feldhacker: Nothing on behalf of the defendant.

The Court: Mr. Adamson.

The Defendant: Nothing at this time, Your Honor.

The Court: All right. The Court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement.

Do you have anything, Mr. Schafer?

Mr. Schafer: Yes. I would like to add one thing.

I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

The Court: The record may show that.

Mr. Feldhacker: That's our understanding.

Mr. Martin: That's correct.

(p. 44) The Court: All right. It is the sentence of this Court that the defendant be sentenced to the custody of the Arizona State Department of Corrections for not less than 48 nor more than 49 years, to date from June 13, 1976, which is the date that the defendant was first taken into custody on these charges. The sentence to be in accordance with numbered paragraph 3 of the plea agreement.

Now, Mr. Adamson, at this time I will notify you that you have a right to appeal from the judgment of guilt and from the sentence which has just been pronounced, except as your right of appeal is affected by the terms of your plea agreement.

You have a right to be represented by attorneys in connection with that appeal and if you cannot afford an attorney, to have an attorney appointed to represent you. The attorneys who presently represent you in court will continue to represent you unless and until some change is made for purposes of any appeal.

Do you understand these rights?

The Defendant: I do.

The Court: Now, under our rules, the clerk is required at this time to give you a written notice of your right of appeal and she has that form and she is going to give it to you and I'm gong to ask you to (p. 45) please acknowledge receipt of the form.

(Whereupon, defendant signs a document.)

The Court: Now, that formal notice of your right of appeal is—there is also a provision in Subparagraph 11 of the plea agreement with regard to any appeal and that form is further modified by that provision in the plea agreement.

Is there anything further?

Mr. Schafer: The State has nothing further.

Mr. Feldhacker: Nothing on behalf of the defendant.

The Court: It is ordered that the defendant be remanded to the custody of the sheriff.

We stand at recess.

(Whereupon, court recessed at 2:50 p.m.)

(p. 2) [Caption omitted]

Phoenix, Arizona
April 18, 1980
[Excerpt]

PROCEEDINGS

* * * *

Mr. Feldhacker: Your Honor, may I be heard on the ruling of the Court directing my client to answer the question?

The Court: You may.

Mr. Feldhacker: The prosecutor has presented to the Court a plea agreement as an exhibit in my client's case, Criminal Cause 93385, that was transferred to Pima County and presided over by Judge Birdsall. My client has invoked his Fifth Amendment privilege on the basis of the last question. The Court has indicated that it believes that this is simply a yes or no answer, which is true. However, I might submit to the Court that I believe that my client is now, pursuant to correspondence from the prosecution, subject to being prosecuted for the killing of Donald Bolles on a first degree murder charge.

I also believe that they may intend to use certain evidence against him that they have received as a result of many conversations they have had with John in the past. Based on that belief, I think the question that has just been posed to Mr. Adamson is in fact a foundational question that they may raise when they are trying to present evidence against him. (p. 3) in other words, foundation of a time, place and area of conversation. And

for those reasons and because that can be a foundational question for incriminating evidence, I think that we have directed our client appropriately to refuse to answer based on the Fifth Amendment.

* * * * *

Mr. Feldhacker: It would be Mr. Adamson's position, Your Honor, that it is for this Court to merely determine whether or not Mr. Adamson has appropriately invoked the Fifth Amendment based on the fact that he has a fear of being prosecuted for the murder of Don Bolles. Now, my client has answered that question in the positive, that he does have a fear of being prosecuted. He also has indicated that he does not feel the plea agreement is in existence because he has completed and fully fulfilled all the obligations under that plea agreement.

I think, Your Honor, I have filed this letter with the Court under a request for a protective order, and so the letter is already in the Court file that I have received from the Attorney General's office. It obviously is their position under paragraph 3 that a refusal of John Adamson to submit to interviews is a violation of the plea agreement and, as the letter carries on, it talks about not only prosecuting John Adamson for the killing of Donald Bolles, but prosecuting him for many other crimes as well.

I think what is happening here is this Court must simply rule on whether or not my client is properly invoking the (p. 4) Fifth Amendment. We have another forum and another Court who presided over Criminal Cause Number 93385, that is before the Pima County Superior Court, before Judge Ben Birsdall in Pima County. That was a plea agreement that was reviewed by him and

accepted by him at the time that he had that case. The only reason it is transferred back to Maricopa County, as far as my understanding, is because of recordkeeping policies.

Mr. Adamson's plea agreement, again, we believe has been fulfilled. I don't believe he is under an obligation to testify at the trial against either Max Dunlap or James Robison. That may be another matter as to whether or not he refuses to testify. But, again, I believe, Your Honor, it is Judge Birdsall who must preside over the actual question of whether or not that plea agreement has been completed, whether or not the State is in violation of the agreement, whether or not John Adamson is in violation of the agreement; and then the second threshold question must be answered as to if Mr. Adamson is not in violation of the agreement, what happens, and if he is in violation, what is to happen.

Now, that man has been sentenced, and it is our position, Your Honor, that the only thing that this Court must rule on at this time for these questions is whether or not it is appropriate for him to take the Fifth Amendment, and where he has a fear of being prosecuted not only for first degree murder but other cases as well, I think it is appropriate on foundational (p. 5) questions for him to invoke the Fifth Amendment.

For that reason, Your Honor, I am asking the Court to reconsider its ruling directing my client to answer the last question that was in conjunction with the giving to the Court the copy of the plea agreement.

• • • • •

The Court: On the matters then that have been presented the Court will reverse its previous ruling requiring the witness to answer the question.

• • • • •

[Caption omitted]

MOTION TO COMPEL TESTIMONY OF WITNESS OR IN THE ALTERNATIVE FOR A STAY

COMES NOW, plaintiff, State of Arizona, by and through counsel undersigned, and moves this Court for an Order compelling the witness John Harvey Adamson to answer questions propounded by the parties pursuant to a plea agreement previously entered into between the witness John Harvey Adamson and the State of Arizona, attached hereto as Exhibit A and hereby made a part hereof, and pursuant to Rule 15.3(a)(3).

Alternatively the State requests that the Habeas Corpus hearing, Motion To Set Bail hearing and Motion for Taking Deposition hearing, by all parties, be temporarily suspended so that the State may seek a Petition for Special Action in the Arizona Supreme Court.

DATED this 22nd day of April, 1980.

ROBERT K. CORBIN
Attorney General

/s/ Stanley L. Patchell
Assistant Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007

Attorneys for PLAINTIFF

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 15.3 permits the court to require a witness to testify if it is apparent that the testimony is material and

the witness refuses. This is the case with John Harvey Adamson.

Rule 3, Arizona of Procedure for Special Action states the grounds available for seeking a special action. Because of the obvious materiality of the witness' testimony Rule 3(C) would be alleged as grounds for the Action should the court refuse to compel the testimony of the witness Adamson.

Respectfully submitted this 22nd day of April, 1980.

ROBERT K. CORBIN
Attorney General

/s/ Stanley L. Patchell
Assistant Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007

Attorneys for PLAINTIFF

(p. 6)

Phoenix, Arizona
April 22, 1980
[Excerpt]

PROCEEDINGS

• • • • •

The Court: The record may show that the State of Arizona has filed and submitted to the Court a motion to compel testimony of the witness John Harvey Adamson or in the alternative for a stay. The Court will hear the matter prior to the continuation of the testimony of the witness John Harvey Adamson.

Mr. Patchell.

Mr. Patchell: Thank you, Your Honor. It is the State's position, Your Honor, that the witness John Harvey Adamson, pursuant to the plea agreement entered into previously, is required to answer the questions that have been propounded to him by the defendant Dunlap.

Specifically referring to subparagraph 5 of the plea agreement, it says: "It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials."

This is a hearing within the contemplation of the plea agreement and, therefore, Mr. Adamson should be required (p. 7) by the Court to testify at this hearing. It is at least contempt on the part of Mr. Adamson to refuse to testify at this point if not a complete violation of the plea agreement.

It is Mr. Adamson's contention, pursuant to advice from his counsel, that he is in danger of incriminating himself because he is testifying about matters for which he himself could be prosecuted if in fact the plea agreement still exists. His lawyer on Friday told the Court that he is refusing to answer because he believes that the plea agreement between Adamson and the State has been fulfilled and that there is no compelling reason for him to testify pursuant to the plea agreement anymore.

It is the State's position that that is incorrect. It is the State's position that the Court at this point should construe the agreement, which is attached as an exhibit to the State's motion to compel testimony, and make a ruling and a determination as to whether or not Mr. Adamson must testify pursuant to this plea agreement. The plea agreement is a matter of a few pages long, it is a matter of some 18 paragraphs, all of which can and should be construed by this Court at this time.

In the alternative, the State has asked that the hearings upon which his testimony is to apply, Mr. Adamson's testimony is to apply, for bail, for taking depositions and the habeas corpus hearing, be stayed until the State has an opportunity to have the matter determined by the Arizona Supreme Court (p. 8) pursuant to a petition for special action. That is the State's position at this point, that the agreement must be construed by this Court at this time so that the witness Adamson may know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing.

In the alternative, we make the request for the stay so we can have that matter determined by the Supreme Court.

* * * * *

The Court: It is ordered that the State's motion to compel testimony of the witness John Harvey Adamson is denied. The Court will rule as to each question as presented to the witness.

It is further ordered that the alternative motion of the State for a stay of these proceedings is denied.

* * * * *

JOHN HARVEY ADAMSON

called as witness herein, having been first duly sworn, testified as follows:

* * * * *

CROSS EXAMINATION

By Mr. Henze:

Q. Mr. Adamson, are you invoking your privilege not to incriminate yourself under the Fifth Amendment to the United States Constitution and refusing to answer the questions that have been (p. 9) asked of you by now both the State, the attorneys for defendant Dunlap and myself because you are afraid of being prosecuted for anything?

A. I am taking the Fifth Amendment on advice of counsel.

Q. When you say in response to my last question you are taking the Fifth Amendment on advice of counsel, are you taking the Fifth Amendment to my last question, or is that an answer as to why you are taking the Fifth Amendment?

A. That is an answer.

CROSS EXAMINATION

By Mr. Patchell:

Q. Mr. Adamson, would your answer be that you are taking the Fifth Amendment to any testimony, whether under oath or not, at all interviews, depositions, hearings and trials?

A. Can I have the question read back? I lost it.

(Whereupon, the last question was read by the court reporter.)

The Witness: May I consult with counsel?

The Court: You may.

(WHEREUPON, the witness conferred privately with his counsel.)

The Witness: Under the circumstances, yes.

Q. By Mr. Patchell: I'm sorry?

The Witness: Under the circumstances, yes.

(p. 10) Q. To just add a little to my last question, that phraseology I got from the plea agreement, did you realize that, or from the whatever you want to call it, this document?

A. It sounded like Bill Schafer's words: I didn't know whether he had written it down for you to ask or whether it came out of the plea agreement, but it sounded like Bill Schafer.

Q. I am telling you now that is from the plea agreement.

A. I have to believe you, Stan.

Q. Do you still answer that way?

A. Yes.

Q. In light of that?

A. Yes.

Mr. Patchell: That is all I have.

• • • • •

(p. 11)

Phoenix, Arizona
April 24, 1980
[Excerpt]

PROCEEDINGS

• • • •

Mr. Feldhacker: The State is asking this Court to order him to testify under the plea agreement. I think the State keeps using this plea agreement as a document that they think has some full, force and effect before this Court. I submit that the Court cannot utilize the plea agreement to order Mr. Adamson to testify for the reason that the plea agreement, it is our position, has been fulfilled.

Further, I don't think anyone at this point in time has jurisdiction over that plea agreement and John Harvey Adamson other than merely if he is subpoenaed as a witness in this case. He will respond to a subpoena. He may appear in Court. He may refuse to testify. And he may certainly be held in contempt for a refusal to testify. However, I don't think that anything under the plea agreement can be ruled upon by this Court.

• • • •

IN THE SUPERIOR COURT
Of Maricopa County, State Of Arizona

No. CR-

STATE OF ARIZONA,

Plaintiff,

vs.

JOHN HARVEY ADAMSON,

Defendant.

INFORMATION FOR MURDER

The ARIZONA ATTORNEY GENERAL accuses JOHN HARVEY ADAMSON on this 8th day of May, 1980, of the crime of Murder, a felony, charging that in Maricopa County, Arizona:

JOHN HARVEY ADAMSON, on or about the 2nd day of June, 1976, and before the filing of this Information, murdered Donald F. Bolles in violation of Ariz.Rev. Stat.Ann. §§ 13-451, 13-452 as amended, 13-453 as amended, and 13-454 as amended (presently Ariz.Rev.Stat.Ann. §§ 13-703 as amended, 13-1101, 13-1104, and 13-1105).

ROBERT K. CORBIN
Attorney General

/s/ William J. Schafer, III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[Caption omitted]

PETITION FOR SPECIAL ACTION

(Filed May 13, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorneys undersigned, as and for his Petition for Special Action, hereby alleges and states as follows:

I

That the Petitioner was charged by way of a complaint on June 13, 1976 with the killing of Donald F. Bolles in Maricopa County, Arizona in the Northeast Phoenix Justice Court.

II

That the Petitioner was held to answer on this open murder charge, resulting in an Information being returned against the Petitioner in the Superior Court in and for the County of Maricopa, in Case No. CR-93385.

III

On January 15, 1977 Petitioner entered a plea of guilty to the open murder charge before the Honorable Ben Birdsall, Judge of the Superior Court in and for the County of Pima, in Case No. CR-93385, alleging the killing of Donald F. Bolles, and at that time the charge was designated as murder in the second degree.

IV

Thereafter, the plea agreement was accepted by the Superior Court and, on December 7, 1978, Petitioner John

Harvey Adamson had Judgment of Guilt rendered against him by the Honorable Ben C. Birdsall in CR-93385 and was sentenced at that time to a term of not less than 48 nor more than 49 years at Arizona State Prison to date from June 13, 1976. (Copy of the minute entry of that sentencing attached hereto and fully incorporated by reference herein and designated as Exhibit A)

V

Thereafter, on the 8th day of May, 1980 the office of the Attorney General of the State of Arizona, by and through its Chief Counsel, William J. Schafer III, filed a document entitled "Information for Murder" in CR-93385, and a warrant was issued on the basis of that information by the Honorable William French.

VI

On the 9th day of May, 1980, a motion to quash that warrant and to strike the pleading entitled "Information" was filed by counsel for Petitioner and a hearing was set for May 12, 1980 at the hour of 11:00 o'clock a.m. before the Honorable William French.

VII

On May 12, 1980, oral arguments were heard on Petitioner's request to quash the warrant and to strike the pleading entitled "Information".

VIII

On May 12, 1980, in the afternoon, the Honorable William P. French entered his Order denying Petitioner's

request to quash the warrant and to strike the pleading entitled "Information" from the Court file in CR-93385 and entered an Order granting the State's request for a petition for habeas corpus ad prosecutum and ordering that the defendant be subjected to an initial appearance and arraignment on the Information for Murder as filed by the State on the 8 day of May, 1980.

IX

This Court has jurisdiction of this Special Action pursuant to 17 A.R.S. Rules of Criminal Procedure for Special Actions, Rule 3(b) and (c). The denial of the Petitioner's motion to quash the warrant and to strike the pleading entitled "Information" from the file was arbitrary, capricious and an abuse of discretion.

X

There has never been a judicial Order setting aside any of the Superior Court Orders in CR-93385 entering a Judgment of Guilt and a sentencing against the Petitioner JOHN HARVEY ADAMSON for the murder of Donald F. Bolles.

XI

Such a judicial Order would be mandatory to allow the State to proceed with the prosecution as it has as alleged herein.

XII

The Superior Court of the State of Arizona, as a result of the entry of the judgment and sentencing on December 7, 1978, is without jurisdiction to hear any further

matters in this case as the defendant's sentence was legally imposed and the defendant is still currently serving his term of 48 to 49 years for the killing of Donald F. Bolles.

XIII

That unless this Court grants the Petitioner's Petition for Special Action, it will create irreparable harm to the Petitioner by exposing him to a Court without jurisdiction and, further, exposing him to double jeopardy in violation of the double jeopardy clauses of the United States and Arizona Constitutions.

XIV

That the Petitioner has no equally plain, speedy and adequate remedy by appeal.

WHEREFORE, the Petitioner respectfully requests:

1. That an interlocutory stay order issue out of this Court prohibiting the Maricopa County Superior Court from proceeding with the prosecution in this matter until such time as this Court has ruled on this Petition;

2. That an Order issue out of this Court prohibiting the Respondents from subjecting the Petitioner to a second prosecution under these circumstances and that this matter be dismissed with prejudice; and

3. For such other and further relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED this 13 day of May, 1980.

MARTIN & FELDHACKER

By: /s/ William H. Feldhacker
5829 N. 7th St., Suite 1-C
Phoenix, Arizona 85014
Attorneys for Petitioner

MEMORANDUM

Petitioner, by and through his counsel undersigned, hereby presents this Memorandum, together with the attached pleadings that have been filed in this case before the Respondent Judge, as well as referring to the entire file in Maricopa County Superior Court Case Number CR-93385, which Petitioner fully incorporates into this Memorandum by reference thereto, in support of his instant Petition for Special Action.

The Petitioner herein reiterates all of the allegations made in his Petition for Special Action and hereby argues further as follows:

That Petitioner attaches hereto copies of the minute entry designating the entry of judgment of guilt and sentencing of the defendant JOHN HARVEY ADAMSON, in CR-93385 before the Honorable Ben C. Birdsall, Judge of the Superior Court in and for the County of Pima. Further, the Petitioner attaches hereto as Exhibits B, C and D the Information filed by the Office of the Attorney General dated May 8, 1980 as well as the warrant issued thereon, and as Exhibit D attached hereto a copy of the State's request for a writ of habeas corpus ad prosecutum.

As stated in the Petition for Special Action allegations, on May 12, 1980, the Respondent Judge issued an

Order that the petitioner may be prosecuted before the Maricopa County Superior Court in CR-93385 for the crime of murder. Clearly, by referring to the Court file in CR-93385, this Court can see that the Petitioner, JOHN HARVEY ADAMSON has been adjudged guilty and sentenced to prison for the killing of Donald F. Bolles. This judgment of guilt was for the crime of murder in the second degree. There never was any necessity for an amendment of the original charging document as it charged murder open in 1976. The office of the Attorney General on the day of the defendant's entry of his plea, designated the murder open charge as murder in the second degree.

Since that time, there has never been any Order setting aside the judgment of guilt and sentencing by the Honorable Ben C. Birdsall. Further, the defendant is currently serving his time for the killing of Donald F. Bolles, and presently is in the custody of the United States Marshal's office. The defendant's custody with the United States Marshal's office is pursuant to a separate and distinct agreement with the United States Attorney's office resulting in the defendant's cooperation with the United States Attorney's office in the prosecution of Neil Roberts and James Robison for the attempted bombing of the Indian Health Services Building in Phoenix, Arizona.

The Petitioner submits that by the filing of the document entitled "Information" on May 8, 1980 that the State is attempting to prosecute the defendant in violation of A.R.S. § 13-111, Art. II, Section 10 of the Constitution of the State of Arizona, and Article I, Section 9 of the United States Constitution, Amendment 5.

As alleged in the Petitioner's Petition for Special Action, the Petitioner filed a Motion to Quash the Warrant filed in CR-93385 and to strike the "Information for Murder" that was filed on May 8, 1980. As to Petitioner's position on the filing of those documents and his objection thereto, Petitioner attaches as Exhibit E to this file a copy of the Petitioner's Motion to Quash the Warrant and to Strike the Information from the Court's file. The Petitioner fully incorporates his arguments contained therein into this Memorandum.

In denying the Petitioner's Motion to Quash the Warrant and to Strike the Pleadings, the Court, in its Order, relied on the cases of *State vs. Rice,* 99 Ariz. 14, 405 P.2d 894 (1965) and *State vs. Johnson,* 97 Ariz. 27, 398 P.2d 392 (1964). The Honorable William P. French relied on those two citations of authority for the proposition that the State could proceed in the manner in which they have in filing the new document entitled "Information".

It is respectfully submitted to this Court that those cases are not only under the old rules of criminal procedure in the State of Arizona; however, are totally inappropriate to the situation before the Court at this time. In the *Rice* case, supra, a defendant requested of the Court to withdraw his plea to the charge of manslaughter. The Court granted the defendant's request and allowed a new charge of murder, which was originally filed to proceed in its place. It is submitted to the Court that that case is entirely different than the one before this Court as it was the defendant who took action to withdraw his plea. Further, that case is very distinct from the one presently before this Court as the matter of the validity

or the invalidity of the defendant's plea had already been ruled upon by a judicial order. The case of *State of Arizona v. Johnson,* supra, is similar in nature in that a Court had already ruled as to the validity of the actions of the State before allowing it to proceed.

In this case, the Attorney General's office, by and through its assistant, William Schafer, has argued to the Superior Court that it is entirely up to the office of the Attorney General to determine whether or not JOHN HARVEY ADAMSON has breached his plea agreement and, if in their opinion, he has breached his agreement, they may proceed to prosecute. Apparently, Judge French has agreed with their position and has allowed them to proceed with a prosecution of JOHN HARVEY ADAMSON. There is no doubt that this is an arbitrary and capricious ruling by Judge French and allows the Maricopa County Superior Court to simply become an arm of the prosecution and let them do what they please with a defendant regardless of whether or not the Court inquires as to its jurisdiction to hear the matters before it. It is inconceivable that a Court would not advise a prosecutor that they must first obtain a competent legal ruling as to whether or not JOHN HARVEY ADAMSON is in violation of his plea agreement prior to proceeding with the prosecution of him.

It is this relief that the Petitioner is requesting by asking that this Court dismiss the proceedings below in the stage that they are in at this time and to order the Court below to take no further action in this matter until such time as the office of the Attorney General appropriately raises the issues as to whether or not they can

proceed with the prosecution of JOHN HARVEY ADAMSON under the circumstances of this case at this time.

It is the Petitioner's position that, especially at this time, allowing the State to proceed would be in violation of a prohibition against double jeopardy. The defendant has entered a guilty plea to the crime with which he is now charged and has been sentenced on that crime. There is no doubt that at the time defendant was sentenced, jeopardy attached. See *Lombrano v. Superior Court,* 606 P.2d 15 (Ariz. 1980).

The defendant has already cited the United States and Arizona Constitutions for their prohibition against multiple prosecutions for the same offense and herein reiterates Article II, Section 10 of the Arizona State Constitution which establishes that:

"No person shall . . . . be twice put in jeopardy for the same offense."

It is clear that State Courts have held that a defendant cannot be tried for the same offense having once been placed in jeopardy. *State v. Burruell,* 98 Ariz. 37, 401 P.2d 733 (1965).

The defendant herein argues no further on the issues of jurisdiction and double jeopardy as the defendant at this time is merely requesting an Order of this Court addressing itself to the appropriateness of the action before the Honorable William French on the 12th day of May, 1980. It is respectfully submitted that if, at such time, the State appropriately raises the issue of the validity of the defendant's plea agreement, that that matter will be addressed in a full and complete hearing at the appropriate time. However, if the State never wishes to

address itself in requesting a Court to rule on the validity of the defendant's plea agreement, it is submitted that it may find itself in a position of total inability to proceed with any prosecution against JOHN HARVEY ADAMSON.

RESPECTFULLY SUBMITTED this 13 day of May, 1980.

MARTIN & FELDHACKER

By: /s/ William H. Feldhacker
5829 N. 7th St., Suite 1-C
Phoenix, Arizona 85014
Attoneys for Petitioner

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[Caption omitted]

RESPONSE TO PETITION
FOR SPECIAL ACTION

(Filed May 16, 1980)

For their response respondents:

I

Admit the allegations of paragraph I in the petition.

II

Admit the allegations of paragraph II in the petition.

III

Admit the allegations of paragraph III in the petition.

IV

Admit the allegations of paragraph IV in the petition.

V

Admit the allegations of paragraph V in the petition.

VI

Admit the allegations of paragraph VI in the petition.

VII

Admit the allegations of paragraph VII in the petition.

VIII

Admit the allegations of paragraph VIII in the petition.

IX

Admit the allegations of paragraph IX in the petition.

X

Admit the allegations of paragraph X in the petition.

XI

Deny the allegations of paragraph XI in the petition.

XII

Deny the allegations of paragraph XII in the petition.

XIII

Deny the allegation of paragraph XIII in the petition.

XIV

Admit the allegations of paragraph XIV in the petition. As affirmative defenses respondents allege that:

I

Petitioner breached his agreement with the state referred to in paragraphs III and IV of the petition.

II

Petitioner's breach of the agreement automatically rendered the agreement null and void, put both parties back into the position they were in before they entered

into the agreement and automatically reinstated the original open murder charge.

III

The filing of the Information referred to in paragraph V of the petition was a proper method to bring petitioner before the trial court and start proceedings on the original charge.

IV

By its voluntary agreement and the breach thereof, petitioner has waived any claim to jeopardy on the reinstatement of the original charge.

Wherefore, respondent denies that petitioner is entitled to a stay or a prohibition of the current proceedings against him in the Maricopa County Superior Court.

Respectfully submitted this 16th day of May, 1980.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

RESPONDENTS' MEMORANDUM

In this Court petitioner argues the same things he argued below to Judge French. He maintains that the

state had no authority to file the May 8, 1980, Information for open murder, that the judge had no authority to issue a warrant, that the Information should only be filed with Judge Birdsall in Pima County, and that Mr. Adamson could not now be tried for murder because he is already serving a sentence for second degree murder involving the same incident.

In 1976 an information was filed in this case, Maricopa County Superior Court case No. CR-93385. It charged Mr. Adamson with murdering Don Bolles. In January, 1977, Mr. Adamson entered into an agreement with the state to testify against a number of other people for a variety of crimes in exchange for a plea to an amended charge of murder in the second degree. He agreed that he would testify fully whenever called upon by the state at a trial, a hearing or a deposition. He agreed that if he did not testify when called upon, the original murder charge would be automatically reinstated and that he would thereafter go to trial on that charge. He also agreed that if he did not testify he and the state would be returned to the position each was in before the agreement. Mr. Adamson agreed to all of this in writing by signing the plea agreement, then orally when he pleaded to the amended charge. At his change of plea the court noted specifically:

> Paragraph 15, in the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement. I understand that to mean, sir, that you would be facing the charge of open murder as you were when you first came into this court.

(R.T. of Plea, Jan. 15, 1977, at 19.) Mr. Adamson's answer to this was, "Yes, sir." Thus, when Mr. Adamson

breached the agreement he was put back in the position he was in before he entered into the agreement—facing an information in Maricopa County case No. CR-93385 charging him with open murder.

With the breach, the open murder charge was automatically reinstated. Nothing had to be done by a court or the defense. The only thing needed was an act of reinstatement by the state. This situation is not new in Arizona. This Court has faced similar situations twice: *State v. Rice,* 99 Ariz. 14, 405 P.2d 894 (1965); *State v. Johnson,* 97 Ariz. 27, 398 P.2d 392 (1964). In both cases original informations had been amended, in *Rice* by a plea, in *Johnson* by the state. In both cases the question was how to revive the original information, or at least its contents. Each trial court "reinstated" the original information and ordered trial to proceed. This Court upheld both convictions but chided each trial court for "reinstating" the original information. What took place legally, said this Court, was an amendment of the charges pleaded to, to conform to the original charges. This is all the information filed against John Adamson on May 4 [sic] did.

Filing a second information in the same action where the first may have lost its vitality is not new in Arizona. When motions to quash existed, a second information was specified as one of the remedies when a motion was granted. See *State v. Freeman,* 78 Ariz. 281, 279 P.2d 438 (1955). Although motions to quash do not remain, the remedy does. See *States v. Sims,* 114 Ariz. 292, 560 P.2d 810 (Apr. 1977); *State v. Fuentes,* 12 Ariz.App. 48, 467 P.2d 760 (1977).

There was no reason to file the information with Judge Birdsall in Pima. Filing is a ministerial act. An information is filed with the clerk's office, not a judge. The only proper place to file a document in Maricopa County case No. CR-93385 is with the clerk's office in Maricopa County. That file is with the Maricopa County Clerk. It has retained its Maricopa number throughout; and, as the minute entry of December 15, 1976, shows, defense counsel insisted upon that. Judge Birdsall and Pima County came in contact with the case only after a motion for "change of the place of trial" was granted under Rule 10.3. And that was the only reason the case went to Pima—for a change of the place of trial because of the publicity that surrounded the case in 1976. It is now four years later. The reason for sending the case to Pima no longer exists.

Petitioner argues that a warrant may be issued only upon the issuance of an indictment or a finding of probable cause by a magistrate. But that isn't true. As the comment to subsection "c" of Rule 3.1 shows, a court has inherent power to issue warrants for any number of reasons. See Ariz.Rev.Stat.Ann. §§ 12-122, 12-123 as amended. And courts properly do it all the time—for defendants who fail to show or wander off, for witnesses, and even third parties. Rule 3. is not meant to narrow the court's inherent powers; a warrant is simply a way of getting a person before the court. But because Mr. Adamson is in federal custody this may be academic. A proper way to bring Mr. Adamson out of federal custody and before this Court is by a writ of habeas corpus ad prosequendum. This is what is required by 18 U.S.C.A. § 4085 and case authority. *Trigg v. Mosely,* 433 F.2d 364 (10th

Cir. 1970); *State v. White,* 39 Okl.Cr. 242, 264 Pac. 647 (1928); see *State v. Heisler,* 95 Ariz. 353, 390 P.2d 846 (1964). Judge French properly issued a writ of habeas corpus ad prosequendum. The writ was executed and petitioner appeared for arraignment before a court commissioner on May 12. Counsel was appointed for him, he was ordered held without bond and a trial date of July 3, 1980 was set. When petitioner voluntarily entered into his plea agreement he knew that if he breached the agreement the sentence he was serving (because it began to run from the day he was arrested) was null and void and he would be prosecuted for murder and could receive a death sentence.

Attached to this response is a copy of petitioner's plea agreement, and a copy of his sentencing where he and his lawyers acknowledged that he would return for further testimony. Also attached is a copy of his lawyers' letter of April 3, 1980, announcing that petitioner would no longer testify, a copy of the state's reply to that letter, a copy of the state's motion to compel petitioner's testimony and copies of transcript references of petitioner's refusal to testify.

The question of whether petitioner is obligated to testify under his agreement is important to the continued prosecution of those responsible for the murder of Don Bolles. Respondents urge this Court to take jurisdiction of this special action and decide the issue.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

By: /s/ William J. Schafer, III
Chief Counsel
Criminal Division

Attorneys for PLAINTIFF

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[Caption omitted]

PETITIONER'S MOTION FOR DISMISSAL OF PETITIONER'S PETITION FOR SPECIAL ACTION

(Filed May 16, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney, WILLIAM H. FELDHACKER, hereby moves this Court for an Order dismissing the Petition for Special Action filed in this matter on the 13th day of May, 1980 in behalf of JOHN HARVEY ADAMSON. Currently, this Court has set an informal hearing for the 28th day of May, 1980 at 10:00 a.m. Petitioner requests that that hearing be vacated and that the Petition be dismissed for the following reasons:

At the time that the Petition for Special Action was filed in behalf of the Petitioner, this Court, by and through the Honorable Justice Jack D. H. Hays denied Petitioner's request for stay of the proceedings below.

Thereafter, the Petition was filed by the Petitioner's counsel and a hearing date set for May 28, 1980 at 10:00 a.m. before the Supreme Court.

Due to the denial of the request for a stay of the proceedings below, Petitioner was subjected to an initial appearance on an open murder charge in the Court below as well as being subjected to an arraignment in the Maricopa County Superior Court with a trial date set of July 3, 1980 before the Honorable Sarah D. Grant, Judge of the Maricopa County Superior Court.

Based upon the argument before the Honorable William P. French, Chief Criminal Presiding Judge of the Maricopa County Superior Court, leading to this Petition for Special Action, and the arguments and record made before the Commissioner at the time of the Petitioner's initial appearance and arraignment, it is the Petitioner's position that an adequate record has been made below to establish his position of double jeopardy and that the Petitioner may now proceed through the normal channels of appeal should he continue to be prosecuted on the open murder charge that the State currently feels is pending against him.

For all of these reasons, it is respectfully requested that this Court enter an Order dismissing Petitioner's Petition for Special Action and vacating the hearing date of May 28, 1980 before this Court.

RESPECTFULLY SUBMITTED this 16th day of May, 1980.

MARTIN & FELDHACKER

By: /s/ William H. Feldhacker
5829 N. 7th St., Suite 1-C
Phoenix, Arizona 85014

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[Caption omitted]

OPPOSITION TO PETITIONER'S MOTION
FOR DISMISSAL OF PETITIONER'S
PETITION FOR SPECIAL ACTION

(Filed May 16, 1980)

Respondents oppose petitioner's motion to dismiss his own special action for the reasons set forth in the accompanying memorandum.

ROBERT K. CORBIN
Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

MEMORANDUM

The issues in the special action are joined. Respondents filed their response to the petition for special action and served petitioner by mail today, Friday, May 16, 1980. The issue presented to the Court is of great importance to the entire criminal justice system in the State of Arizona. It concerns one of the most important criminal prosecutions in this state's history. Until today petitioner has insisted that a court determine the issue concerning his plea bargain and his testimony against Max Dunlap in the forthcoming murder trial in Maricopa County Superior Court. Petitioner posited the issue to the Court on Tuesday, May 13, when he filed his special action. The state responded agreeing that the issue was before the Court and arguing that jurisdiction should be taken by this Court. With the issue before this Court and a hearing set for May 28, the state moved for a continuance of the Dunlap trial date of May 21, to allow this Court to decide the issue and avoid the necessity of the state moving to dismiss the charge against Dunlap. The state's motion to continue was denied late yesterday afternoon. With that the state was once again faced with the alternative of renegotiating with Mr. Adamson or dismissing the charge against Mr. Dunlap because Mr. Adamson refused to testify. And it was only after Judge Myers denied the state's motion for a trial continuance that Mr. Adamson moved to dismiss his special action which would have resolved the issues. Adamson's position has not changed since he filed his petition on Tuesday. The only things that took place are an initial appearance and an arraignment.

This Court should not countenance any more such strategic maneuvers. Because the issues are joined and petitioner has been served with the response, the action is not his to dismiss; it is now discretionary with this court. Rule 41(a), Rules of Civil Procedure.

The motion to dismiss should be denied.

Respectfully submitted this 16th day of May, 1980.

ROBERT K. CORBIN
Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

IN THE SUPREME COURT OF
THE STATE OF ARIZONA

[Caption omitted]

REPLY TO RESPONDENTS' OPPOSITION TO MOTION FOR DISMISSAL OF PETITION FOR SPECIAL ACTION

(Filed May 19, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undesigned, hereby replies to Respondents' Opposition to Motion for Dismissal of Petition for Special Action.

Initially, Respondents contend that the issues raised in Petitioner's Petition for Special Action are now joined and that pursuant to 16 A.R.S., Rules of Civil Procedure, Rule 41(a), a dismissal of the petition is discretionary with the Court. Petitioner informed William J. Schafer III, Assistant Attorney General, on Thursday, May 15, 1980 that Petitioner was contemplating dismissing his Petition for Special Action in the above-captioned matter. This was an oral indication made by counsel for Petitioner to Mr. Schafer and said communication was delivered prior to Judge Myers' ruling regarding the State's motion to continue the trials of Max Dunlap and James Robison.

The following morning, that is May 16, 1980, Petitioner filed a pleading captioned "Petitioner's Motion for Dismissal of Petitioner's Petition for Special Action". This pleading was filed at approximately 11:30 a.m. Counsel undersigned is informed that subsequent to that time on that date the State of Arizona, through Mr.

Schafer, filed its Response to the Petition for Special Action and served Petitioner by mail.

At the time of the dictation of this reply, Petitioner has not received Respondents' Response. Therefore, Petitioner requests that this Court treat his motion to dismiss the Petition for Special Action as in fact a Notice of Dismissal filed before service by the Respondents of their response on the Petitioner, and that this matter be dismissed pursuant to 16 A.R.S., Rules of Civil Procedure, Rule 41(a).

In light of some of the allegations made by the Respondents in their opposition to Petitioner's Motion for Dismissal, Petitioner feels constrained to respond to these allegations for the record. Respondents contend that until the filing of his Mótion to Dismiss the Special Action Petition, Petitioner "has insisted that a Court determine the issue concerning his plea bargain and his testimony against Max Dunlap in the forthcoming murder trial in the Maricopa County Superior Court". To the contrary, Petitioner has maintained throughout the last two months that, in fact, he has discharged all of his obligations taken on pursuant to his plea agreement with the State of Arizona in Maricopa County Criminal Cause No. 93385. At no time has Petitioner ever requested any Court to determine any issue concerning his plea agreement in that matter. Further, Respondents argue that by the filing of his Petition for Special Action, Petitioner has posited the issue regarding his plea agreement to this Court. A reading of Petitioner's Petition for Special Action will reveal that the question of the Petitioner's compliance with the provisions of his plea agreement has not been raised by the allegations in his petition and that, in fact, Mr. William H. Feldhacker, counsel for Petitioner, on Tuesday, May 13, 1980, specifically informed the Honorable Jack D. H. Hays that Petitioner was not raising that issue in his Petition.

The Respondents further contend that the issue as they see it presented to the Court by Petitioner's Petition for Special Action is of great importance to the entire criminal justice system in the State of Arizona and concerns one of the most important criminal prosecutions in this State's history. In that regard, notwithstanding the notoriety of this case, Petitioner is nevertheless entitled, through his counsel, to defend against the allegations leveled against him by any manner within the bounds of the law. If it is Petitioner's desire to dismiss his Petition for Special Action and he has followed the requirements as set forth by the rules, those rules should not be ignored and disregarded because of the nature of the case. By the filing of Petitioner's Motion for Dismissal of Petitioner's Petition for Special Action, as supplemented by this Reply to Respondents' Opposition thereto, it is Petitioner's intention to voluntarily dismiss his Petition for Special Action in the above-captioned matter.

DATED this 19 day of May, 1980.

MARTIN & FELDHACKER

By: /s/ Gregory H. Martin
5829 N. 7th St., Suite 1-C
Phoenix, Arizona 85014

(p. 2) IN THE SUPREME COURT OF
THE STATE OF ARIZONA

[Caption omitted]

Phoenix, Arizona
May 28, 1980

Justice Struckmeyer: Cause 14898, John Harvey Adamson against the Superior Court of Maricopa County. Fine. Thank you, Gentlemen.

Mr. Feldhacker: If it please the Court, my name is Bill Feldhacker. I represent the petitioner in the Petition for Special Action, along with my partner, Greg Martin.

We have brought a petition before this Court basically because Judge French is now allowing the prosecutor to proceed with the prosecution of John Harvey Adamson when there's a valid judgment appealed from the sentencing in the file in case number CR 93385.

I argued before Judge French that it was inappropriate for him to allow the State to proceed with the prosecution when there is a valid judgment of guilt and sentencing on file. That apparently was simply overlooked or ignored by Judge French. I have attached a copy of that to my pleadings that I filed before this Court.

(p. 3) Now, after the pleading was filed with this Court, I filed later a motion to dismiss the Petition for Special Action. The reason I filed that is because prior to receiving a response from the State, I had a conversation with Mr. Schafer from the Attorney General's Office, and I received an indication at that time that Mr.

Schafer felt that there were more issues that he was going to raise before this Court than what my intention was to raise.

He felt that issues of whether or not John Harvey Adamson had violated the plea agreement and whether or not he can be forced to testify were before this Court. I advised him that was not my intent, that was not in my petition, and that's not what I'm addressing before this Court today.

The sole issue that I am addressing before this Court is that fact that the Attorney General's Office is proceeding without any authority. They have taken it upon themselves to tell Judge French that a certain man can be prosecuted for a crime for which he is now serving a sentence of forty-eight to forty-nine years. He was sentenced by Judge Birdsall.

I submit to the Court that you will find nothing anywhere in the pleading or the file to indicate that there is anything incorrect or inappropriate about the sentence that my client is now serving.

So based upon those facts, Your Honor, I think (p. 4) there is no doubt that my client is now being subjected to double jeopardy, and I ask the Court to cease the action that's presently pending in Maricopa County Superior Court under 93385.

Justice Holohan: I take it in the arguments—the matters presented to Judge French, that the principle contention was that the petitioner has violated his plea agreement.

Mr. Feldhacker: The contention by the State, Your Honor. That was the contention by the State.

Justice Holohan: Apparently Judge French agreed, denied your motion, and allowed the prosecution to continue.

Mr. Feldhacker: The record would not show that, Your Honor. The record would actually, in fact, show at the close of arguments Judge French, on the record, made a comment that he feels as though at some point in time there is going to have to be some court order as to whether or not the judgment and sentence in the file can be set aside.

My response to that is that it's almost—you know that you are dealing with a contract situation. What is happening is Judge French is giving the State their remedy and then saying, Now, go to court and see what's right or wrong. That's inappropriate, and I don't think that's the process that any of us want to see happen.

The process that is applicable here is for the (p. 5) State to seek any appropriate remedy they think may exist and then, if they are dissatisfied with the results, come back before this Court. And again, the only issue I'm raising is that my client is now being subjected to double jeopardy and further prosecution, interestingly enough in the same case number; and there's no doubt that he is serving time for the killing of Don Bolles, and he is now being prosecuted by the State for the killing of Don Bolles.

Justice Holohan: It's your contention, then, that the provisions of the plea agreement which say that—in effect that if there's a violation, the State may reinstitute the charges, ask for the death penalty, et cetera—

Mr. Feldhacker: Now, I wouldn't argue what the plea agreement says; and specifically in response to that question, Your Honor, I would say any contract, including plea agreements, must in necessity have something in them that calls for an end—a conclusion of the agreement; and if you want to refer to the plea agreement, I would refer this Court to section eight of that plea agreement.

The section eight provides that all parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and exhibits A and B which accompany it.

Just in the early part of December of 1978 my (p. 6) office received a phone call from Mr. Schafer: Let's go to Tucson and sentence John Adamson. There was surprise on my part; however, why should I delay the sentencing? I had no reason to. Mr. Schafer wants my client sentenced. That was my prerogative, because I felt—if you will read this contract, or the plea agreement, you will find when this agreement is to come to an end, and I believe that it came to an end at the time my client was sentenced, pursuant to the provisions of the agreement.

Justice Holohan: Then you feel there is no question for your client to testify on the first case?

Mr. Feldhacker: Your Honor, he testified in the first case as prior to being sentenced, and I think we're at a point in time where the prosecution really needs to be told that if you have an agreement with the defendant and you wish to enforce that agreement and you have a provision such as paragraph eight of our plea agreement, that you do not allow the defendant to be sentenced

and then later expect him to comply with whatever may be in that agreement, because the sentencing is the conclusion of the agreement.

Justice Hays: Counsel, do you give any weight to that portion of the sentencing where I think Mr. Schafer indicated, Now we have it clear for the final acceptance of this plea. We have it clear that Mr. Adamson testified some more—or something to that effect, and nobody seemed to (p. 7) object to that position. I make this response. Was that understood? Does that have any weight, or does it mean—

Mr. Feldhacker: As to the meaning of that, Your Honor—I think that was on December 7, 1978—I believe I have in my notes—I have that there was a discussion of that. I don't think it's as clear as Your Honor has stated, but it's clear that it's understood that it happened.

What happened was that we were asked if there was any legal cause for Mr. Adamson not to be sentenced. We certainly stated there was none. Mr. Schafer said, Yes, I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, that it may be necessary in the future to bring Mr. Adamson back after sentencing for further evidence. The record may show that; and I stated. That's our understanding.

Subsequently there was one case left from exhibits A and B that were appended to that plea agreement, and that case left was State of Arizona versus Ashford. It's a case that was under investigation. It's basically—I would submit from my conversation with Mr. Schafer—a case that they concluded they would never be able to

actually put together and prosecute. However, Mr. Schafer discussed it with us—about the Ashford case; about the fact that, you know, we had that in the agreement; that, if necessary, he (p. 8) may have to testify in that case.

There's a lot of explanation and a lot of things that go beyond the mere statements here, and I submit to this Court that the record is legally inadequate for this Court to make any rulings as to whether or not John Adamson was in violation of any agreement, because there is no record as to what happened, what things mean, any testimony, anything at all before this Court other than what I have raised in my petition.

Justice Holohan: If you are correct, Counsel, that double jeopardy applies, then there can be no claim of the Fifth Amendment. The defendant—or the former defendant must testify—

Mr. Feldhacker: Your Honor—

Justice Holohan:—like any good citizen.

Mr. Feldhacker: That's correct. Now, if we look at it that way, then you may say that my client should not have taken the Fifth Amendment when he was called to testify in the bond hearing for Max Dunlap, which is what the State is saying is the—

Justice Holohan: I'm not concerned about that, since the plea agreement here is the matter in question. If you are wrong, why he needed all the protection the Fifth Amendment gives.

Mr. Feldhacker: Well, I believe anyone, including—

(p. 9) Justice Holohan: No. That's not my question. The point is, now it's your position that if this is applied and that's the end of the matter, then he has no right to the Fifth Amendment from here on in as a witness. I believe he's asked immunity in all these matters that have been delved into.

Mr. Feldhacker: I think with the Court's addition at the end as to matters that Mr. Adamson has been given immunity for, you are correct. Then he would not be taking the Fifth Amendment. However, he's been placed on notice—and that's in the file—that he was subject to being prosecuted, not only for the killing of Don Bolles, but for any other crimes that they may find that he had previously been given immunity for.

I think, under those circumstances, any man will follow the advice of Counsel and invoke the Fifth Amendment.

Justice Struckmeyer: Mr. Schafer?

Mr. Schafer: If it please the Court, I am William Schafer, Assistant Attorney General, and I represent the respondent here.

I am here this morning to ask this Court to take jurisdiction of this case and to decide one issue, and that is the issue from which all of the other issues flow. That is the plea agreement obligating Mr. Adamson to testify against Dunlap and Robison. If it does, then he's breached it, for he has refused to testify.

(p. 10) It does not take a hearing. It does not take witnesses to determine that he breached the agreement. His lawyer said he was gong to do that in a letter which

I have attached to our response here, and that is exactly what he did. He refused to testify.

It's like the breach in the well-know Santobello case. That was the sentinel [sic] case on plea agreements from the U.S. Supreme Court. The breach was clearly ascertainable; and, as in that case, there is no need for a hearing to determine that. There was no hearing in the Santobello case. The record that existed before the Supreme Court showed that they determined that there was a breach from that record as it existed in its preliminary and procedural steps through the court without a hearing to determine the breach.

There is only one issue here behind every point that was raised below. Behind every point that has been raised in the pleadings and the argument here is that one question. Does the agreement require him to testify?

The double jeopardy argument, the argument concerning our authority or right to reinstate the original charges, and the argument concerning—once that is done—our authority or our right to arraign him and start the orderly process, all of those things depend upon whether Mr. Adamson was obligated to testify under the agreement. If he was, he has refused; and all of his arguments are really for (p. 11) nothing, because he waived those arguments when he signed the plea agreement. Now—

Justice Gordon: At that point which, as I understand it, you have noticed that for almost a month he's taken that position, when in fact the outstanding judgment and sentence is sitting there in his file, and has been there, in which he has been serving time in prison.

Do you take the position that he knows the terms of the plea agreement? That that just disappears in the matter of law without any intervention by a judge? Or what does it do? Do you take the position that the Attorney General can treat that judgment and sentence as though it does not exist, especially without a hearing?

Mr. Schafer: Your Honor, I would separate two things. First of all, the question which you raise concerns the judgment that, as Mr. Feldhacker said, was actually sitting in the case. That is probably separate from the authority and the right and the ability of the Attorney General to reinstitute the original charges.

Now, if we reinstitute the original charges, our argument is that that is justified by the plea agreement. I believe it is also justified by case authorities that I've cited to this Court, and I've cited below.

The question is, how do you do that? It makes no difference in that regard that there is a judgment sitting in (p. 12) this case. That judgment will fall once a determination is made that Mr. Adamson had breached the agreement, and it will fall just as though his arguments will fall that he has made concerning the agreement itself.

If this Court is to determine that he has breached that agreement, then it must also determine, according to the terms of the agreement, that the original charges can be reinstated. Either directly or indirectly that would cause that judgment to fall, because Mr. Adamson has agreed—again assuming that you determine that the plea agreement is what it says it is and he has breached it—he has agreed that I can be retried on those original charges, over and above any sentence that I am serving.

So the answer to that question is—our position is yes, that judgment—that sentence—would fall either directly or indirectly, however a court may handle that; but certainly if a court were to say—this Court or any other court—that that plea agreement is in fact—he did breach it, he is chargeable, and he is prosecutable on those original charges, and that is all the court chooses to say, it would obviously by implication mean that that judgment is no longer valid.

Justice Gordon: Well, Counsel, wouldn't it have been better if, after our ruling refusing to interfere with Judge Meyer's determination that Mr. Adamson retained the Fifth, if (p. 13) you had gone to Judge Birdsall's office and entered a judgment for sentence and filed a petition saying, it is the State's position at this point that Adamson has violated—Mr. Adamson has violated his plea agreement, and we would like to set a hearing right away to determine judicially that he has, in fact, violated that agreement, and to get an order from this Court to this very judge who had previously signed the judgment and sentence, setting the plea agreement—or setting that judgment and sentence aside, and proceeding directly to a hearing and setting the matter for trial? Isn't that the normal, logical way to proceed, rather than just saying, Well, don't worry about that, Judge; we'll go along, and if we somehow get this man convicted on a new information, the previous judgment and sentence somehow disappears without further order of the Court?

Mr. Schafer: Well, I would say a couple of things in answer to that. I can't say whether or not it's normal, because I have not run into a case similar to this, either in my experience or in cases and case books that I've

searched for. I searched diligently in an effort to find out what one would do in a situation like this, to reinstate the original charges.

Now, in reference to whether we should go back to Judge Birdsall, no, I don't think we should go back to Judge Birdsall, and I believe that there would have been an (p. 14) argument that you had no place in going to poor Judge Birdsall. This is the third time, I believe, that this case—the Don Bolles murder case—has been before this court. The second time was in relation to a motion for change of place of trial. The only reason we were before Judge Birdsall is because this Court ordered that the place of trial should be changed. It was changed to Tucson. That's all that was sent to Judge Birdsall's court, the change of the place of trial. That has taken place. That is done. That is over with.

The file sits in Maricopa County. Now, if we're to file anything, it seems logical that we should go before Maricopa County. If the presiding judge, or whoever, were to determine this better go back to Judge Birdsall, then so be it. But we shouldn't start there.

Justice Gordon: Now before whom would post-conviction relief be filed?

Mr. Schafer: If you are talking about a Rule 32, I would assume that would be Judge Birdsall. That was the second point I was going to get to, for getting the choice of judges to go before. What you proposed in your question is us going before a judge to ask the judge if this plea agreement is in effect or was in effect, and was there a breach of it; but that's not what the agreement says.

The agreement says that the charges are automatically reinstated, much the same as our Rules of General (p. 15) Procedure provide for a withdrawal of a plea of guilty. We don't have that, unfortunately, so the plea agreement does not provide for that at all, and all of the parties agreed to automatically reinstate it.

Now, the question is obviously—when I came to research this—"automatically" is fine and good, and everybody knows what that means, but how do we put that across to a judge? We just can't simply file papers saying, automatically reinstate these. Something has to be filed to signify the automatic reinstatement.

The method I chose was based on two cases from this Court for reinstatement of original charges. So the question you propose is different than what is in the plea agreement. The plea agreement nowhere says that we have to go back to a judge, ask him to look at the plea agreement, and then make a determination on a breach, because that is not what we all agreed to from the very beginning.

Now, we are not opposed to—and it's been argued by Mr. Feldhacker before—a court making his determination of a breach. As a matter of fact, when he referred to the argument before Judge French, at the end of the arguments, as I recall, he essentially—if my recall is essentially correct—Judge French said in answer to—I think it was Mr. Martin's argument—that sooner or later some judge is going to have to make a determination as to the (p. 16) plea agreement and whether it's been breached.

Mr. Martin—as I recall, Mr. Feldhacker wasn't there —said that's true. That's their position.

I said the same thing. Yes. Certainly that's going to have to be made sooner or later. We are—we know—both sides know that a motion is gong to be made. Something is going to get the poor judge so that the judge can determine if what we did is correct and if there was actually a breach.

Now, the further argument was made that perhaps that should be made at Judge French's level. Perhaps it was made by Judge French. There is nothing that Mr. Feldhacker says that indicates in his order that he made that determination. Our argument before this Court this morning is that that almost had to be made by Judge French to allow everything to go forward, because everything stems from that one issue.

Justice Hays: Counsel, may I interrupt with something that was raised by Mr. Feldhacker. That's provision eight in the plea agreement. It says all parties to this agreement hereby waive the time for sentencing and agree the defendant will be sentenced at the conclusion of his testimony in all of the cases—and then was sentenced. Would you address that, please?

Mr. Schafer: Well, the first point I raise there, Your Honor, is one that I raised before, and revolves around (p. 17) page 37 of the sentencing itself; and Mr. Feldhacker quoted part of it, but only part of it. What he quoted would not mislead the Court, but I think I should call all of it to the Court, because I think it shows that it was everybody's belief and understanding that that was

not the end of the plea agreement; and this is what happens on page 37 before Judge Birdsall.

First of all he says—this is the Court, all right?

"The Court: Sentencing is limited by the terms of the plea agreement which was entered into in this case." Dot, dot, dot. The rest of it is immaterial at this point. Here. "Do you have anything, Mr. Schafer?

"Mr. Schafer: Yes. I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

"The Court: The record may show that.

'Mr. Feldhacker: That's our understanding.

"Mr. Martin: That's correct."

The reason I raise that and have raised that before is to show that the argument that everybody understood (p. 18) or that everybody should have understood that the agreement was over and done with after Mr. Adamson testified in cases he did, is not really accurate. We point this out to indicate to the Court that there was more.

I will say that in relation to that section of the plea agreement, it's—and I'm—I'm familiar with other plea agreements—that is not an uncommon section to appear in plea agreements. Those are similar words; and it's many times a housekeeping procedure that hopefully we can get everything done and we will sentence this man.

That is also something that is not entirely true in this case, because the sentencing—and part of my argument is—the sentencing added nothing here to what was going on with Mr. Adamson. His sentencing actually began to run from the day he was arrested. This is also part of the plea agreement.

So actually when we went through a sentencing, it was more of a ritual than anything else to satisfy the Rules of Criminal Procedure. He was already serving his sentence; and part of it, as I've argued to this Court before, was for Mr. Adamson's safety—to get Mr. Adamson into a form of confinement and custody that was better than the one he was currently in. In fact, that that sentencing took place added very little, if anything, to what was going on.

The fact and the argument has been raised that he (p. 19) is now serving a sentence adds very little to any of the arguments here. That's all wound up in the double jeopardy argument. Double jeopardy does not prohibit a retrial upon original charges, especially where the defendant—

Justice Struckmeyer: Your time has expired.

Mr. Schafer: Well, let me close by saying my purpose in being here is to urge this Court to take jurisdiction from this case and decide that one issue that really decides everything else. Thank you.

Justice Struckmeyer: Mr. Feldhacker, I'll give you a couple minutes if you wish to respond.

Mr. Feldhacker: Thank you, Your Honor. I will, and very briefly. Mr. Schafer has referred to a sentencing

in this particular case as a ritual. I don't believe that State versus Lombrano that the court decided—or State versus the Superior Court and Bradford,—indicated that the sentence was merely a ritual.

It's a time for things to come to an end in a particular prosecution, and I think there are many cases who at that point up think the prosecution has almost told this court that it can disregard orders of the Superior Court and brush them aside much as they have also said in their pleadings, that they can disregard the Supreme Court orders for the matters to be before Judge Birdsall. That's just past. It's just over with, and yet that order is still (p. 20) in the files.

They would like to disregard a lot of things, and I'm sure the one main thing Mr. Schafer would like to disregard is that he allowed John Adamson to be sentenced. Surely this Court cannot believe that we would not have waived John Adamson's time for a period of twenty years and two months and then allowed him to be sentenced so that he could have concluded all of his obligations.

Justice Struckmeyer: Counsel?

Mr. Feldhacker: Yes, Your Honor.

Justice Struckmeyer: In your opinion where is the venue to the prosecution of Mr. Adamson?

Mr. Feldhacker: In my opinion, Your Honor, there is no proper venue because there is no jurisdiction before any court. However, if there is going to be any hearings or anything else, I think this Court has indicated where the proper venue would be by telling the Superior Court that it should not be in Maricopa County; and Judge Broomfield entering his orders finding in his discretion

that he feels the proper venue is in Tucson and Pima County.

Justice Struckmeyer: Did he enter a formal order transferring the matter?

Mr. Feldhacker: Yes, he did, Your Honor.

Justice Struckmeyer: Thank you.

(p. 21) Mr. Feldhacker: In fact, just briefly touching on that point, Mr. Schafer said that file's back here in Maricopa County. It has a Maricopa County number. Our Rules of Criminal Procedure provide that even when a place of trial is changed, it shall always remain with the same case number as the county from which it came.

Justice Struckmeyer: Very well.

Mr. Feldhacker: Thanks.

Justice Struckmeyer: Thanks, Gentlemen.

* * *

John Harvey ADAMSON,

Petitioner,

v.

The SUPERIOR COURT OF the State of ARIZONA, the Honorable William French, Judge of the Superior Court in and for the County of Maricopa, and Robert Corbin, Attorney General for the State of Arizona, Real Party in Interest: State of Arizona,

Respondents.

No. 14898.

Supreme Court of Arizona,
En Banc.

May 29, 1980.

* * *

HAYS, Justice.

On May 13, 1980 the petitioner filed a Petition for Special Action asking for a stay of proceedings against petitioner, an order prohibiting further prosecution and dismissing the case, and any other and further relief the court deems appropriate. At the initial hearing the court refused to enter a stay but set the petition for hearing on May 28, 1980. Prior to the hearing date, petitioner attempted to have the Special Action dismissed but the court denied his motion.

The factual background necessary for an understanding of the issues raised includes the following: On January 15, 1977 petitioner entered a plea of guilty to an open murder charge in CR-93385, alleging the killing of Donald

F. Bolles; the guilty plea was pursuant to a plea agreement which was accepted by the Honorable Ben C. Birdsall sitting in Tucson, Arizona; the case had been transferred to Pima County for trial; pursuant to the plea agreement, the open murder charge was amended to second degree murder and a sentence of not less than 48 nor more than 49 years was imposed.

Thereafter, pursuant to the plea agreement, petitioner Adamson testified on behalf of the state in the trial of Max Anderson Dunlap and James Albert Robison for the murder of Donald F. Bolles. Both defendants were found guilty and sentenced to death. On appeal to this court, the convictions of Dunlap and Robison were reversed and remanded for a new trial.

A letter dated April 3, 1980 was directed to the Attorney General's office by petitioner's attorney. The letter reads as follows:

"Stanley L. Patchell, Esq.
Assistant Attorney General
Arizona State Capitol Building
Phoenix, Arizona 85007

"Re: State of Arizona vs. John Harvey Adamson

Case No. CR-93385

"Dear Stan:

"I am writing to confirm our telephone conversation of April 2, 1980 wherein we discussed the availability of John Adamson for interviews in preparation for his testimony in the trials of the State of Arizona vs. James Robison and Max Dunlap.

"As I advised you by phone, I have met with John Adamson at his place of incareration [sic] along with my law partner, Greg Martin. We had lengthy discussions revolving around his expected testimony as well as the plea agreement that he had entered into with the State of Arizona in the above-referenced case number. Further, at that time I also delivered to Mr. Adamson a complete set of transcripts of his testimony in the trial of James Robison and Max Dunlap that was previously held.

"After lengthy discussions and consideration of all of the various aspects of this case and the potential ramifications to Mr. Adamson, I can advise you of the following matters:

"1. John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona.

"2. John Harvey Adamson is well aware of the fact that he can be subpoenaed by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called to the stand does not mean that he must testify. He does understand that he may be directly ordered by the Court to testify and, if he refuses to do so, may be held in contempt by the Court.

"3. John Harvey Adamson is further fully aware of the fact that your office may feel that he has not

completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

"4. If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met:

"a. The State of Arizona will agree that, upon his completion of his testimony, John Harvey Adamson will be released from custody immediately. The testimony referred to herein is, of course, testimony in an additional trial of the State of Arizona vs. Max Dunlap and, possibly, testimony in a separate trial of the State of Arizona vs. James Robison. If separate trials are held, Mr. Adamson's demand for his immediate release will apply to the completion of his testimony in whichever trial goes first. This demand is not to be considered to be contingent upon any verdict being reached in either case.

"b. If the State agrees to the first condition, an additional condition will be that when John Harvey Adamson is transported to Maricopa County for his testimony in the above-referenced trial, that he will not be held in a facility of the Maricopa County Jail or the Maricopa County Sheriff's Department. It is his demand that he be held in a non-jail facility with the agreement that there will be full time, that being 24-hour, protection by some law enforcement agency, preferably the U.S. Marshal's office, for Mr. Adamson's safety.

"c. As a further and separate demand, John Harvey Adamson wishes to have a complete clothing outfit prior to his testimony in any trial consisting of a new suit, new shoes, socks, etc.

"d. Mr. Adamson further demands that if his testimony is going to be requested by the State, his ex-wife Mary and his son be provided with protection until such time as Mr. Adamson is released from custody. Further, Mr. Adamson requests that an educational fund be set up for his son.

"e. Mr. Adamson further demands that, upon his release from custody, he will be provided with suitable transportation and funds in order for him to travel to a location outside of the State of Arizona to set up a new identification and life for himself. It is anticipated that the State will work through the U. S. Attorney's office and the U. S. Marshal's office in an attempt to comply with this demand.

"f. Further, John Harvey Adamson demands that, prior to any further testimony and/or interviews, he be provided with full and complete immunity for any and all crimes in which he may have been involved.

"The above basically describes what Mr. Adamson's demands are for his future testimony in any case involving James Robison or Max Dunlap. As we have discussed many times in the past with Bill Schafer, the crimes for which John Adamson requires immunity in order to fully and completely answer any cross-examination by defense counsel, are not of such a nature that the State would be shocked for the State to extend immunity for those crimes. Further, I can represent that any immunity involved as

far as any homicide case would be concerned would be an immunity from prosecution for any indirect, and unknowing, participation in any homicide.

"By this letter, it is represented to you that John Harvey Adamson has not been directly involved in any actual homicide outside of the Don Bolles killing.

"After you have had an opportunity to review this letter and Mr. Adamson's demands, I would appreciate your contacting me as soon as possible to let me know what your position is. I would also like to advise you that the demands outlined above are basically non-negotiable demands. Therefore, if you find that there is an absolute prohibition against any of the above, we can anticipate that Mr. Adamson will not be testifying in any trials in the future.

"Again, I would like to re-emphasize the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulf[illegible]d all of his obligations under the plea agreement. The plea agreement was drafted in such a maner that it was anticipated to be concluded prior to Mr. Adamson's sentencing. It is further our position that, without some type of stipulation, a Superior Court Judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence.

"I look forward to hearing from you in the near future.

"Very truly yours,

"MARTIN & FELDHACKER
"/s/ William H. Feldhacker
"William H. Feldhacker

WHF: ir
CC/John Harvey Adamson"

Thereafter, the Attorney General attempted to force petitioner to participate in the preparation of the retrial of defendants Dunlap and Robison. Hearing was held in Superior Court before the Honorable Robert L. Myers with the state urging that petitioner, pursuant to the plea agreement, should be compelled to testify. The state's motion to compel was denied. The Supreme Court declined to accept jurisdiction of a Petition for Special Action brought on this issue by the state.

The state, on May 8, 1980, filed an information in Maricopa County Superior Court under number CR-93385, charging petitioner with the murder of Donald F. Bolles, and a warrant issued. Petitioner's motions to quash the warrant and strike the new information were denied.

The issues raised by this proceeding are:

I. Has petitioner violated the terms of the plea agreement?

II. If the plea agreement has been violated, did the state proceed properly in filing a new information under the old number and ignoring the judgment of conviction entered pursuant to the plea agreement?

III. Is further prosecution of the petitioner barred by the Constitutional prohibition against double jeopardy?

ISSUE I

[1] The record before us is replete with indications of petitioner's refusal to testify further in the Bolles murder cases. We must examine the agreement itself to determine if such refusal is justified. The following excerpts from the agreement provide the answer to this query:

"4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, ...

"5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's trancribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five (25) years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement."

We have also read some 35 pages of the change-of-plea hearing wherein the court went through the plea agreement paragraph-by-paragraph, questioning the petitioner as to his understanding of each portion. The court ultimately made the finding that the plea was made voluntarily and intelligently with full understanding and that the defendant was competent to enter the plea.

Although the plea agreement does not specifically spell out the duration of petitioner's obligations it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or re-trial after reversal.

At the oral argument for the first time, petitioner disclosed the basis for his contention that he had fully complied with the terms of the plea agreement and no longer

had an obligation to testify further. He referred to item number 8 of the plea agreement which reads as follows:

> "8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it."

The state countered in oral argument by reading the following portion of the transcript of the sentencing hearing:

> "THE COURT: All right. The Court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement.
>
> "Do you have anything, Mr. Schafer?
>
> "MR. SCHAFER: Yes. I would like to add one thing.
>
> "I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.
>
> "THE COURT: The record may show that.
>
> "MR. FELDHACKER: That's our understanding.
>
> "MR. MARTIN: That's correct."

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing. Petitioner has violated the terms of the plea agreement.

ISSUE II

[2] The attorney general, by filing a new information, albeit under the old number, unilaterally determined that the assignment to the Honorable Ben Birdsall was at an end and that the previous order transferring the trial of the case to Pima County was no longer viable. We do not agree with this position.

We have examined the two cases cited by the state, *State v. Rice,* 99 Ariz. 14, 405 P.2d 894 (1965), and *State v. Johnson,* 97 Ariz. 27, 396 P.2d 392 (1964). We do not agree that these cases mandate the filing of a new information nor do they change the definition of the word "reinstate" which is used in the plea agreement.

The state urges that filing a second information in the same action where the first may have lost its vitality is not new in Arizona. As a broad general proposition that may be true, but let us examine such a rule in the context of this case. Although we find sufficient evidence in the record to hold that the plea agreement has been violated, we are aware that at times such a determination might, in another case, require a hearing. *See State v. Warren,* 124 Ariz. 396, 604 P.2d 660 (App.1979). Who is more competent to make such determination after hearing than the judge who accepted the plea? Secondly, the attorney general lacks authority to make a determination that "the reason for sending the case to Pima no longer exists"; this was determined by a court and only a court can set it aside. Orderly judicial process requires that a determination that the plea agreement was violated be made, that the sentence, judgment of conviction and plea of guilty be set aside and that the original information be reinstated pursuant to the plea agreement. Such procedure has not been followed.

ISSUE III

[3] In his Memorandum in support of the Petition for Special Action petitioner asserts that allowing the state to proceed would be in violation of the prohibition against double jeopardy. Citing *Lombrano v. Superior Court,* 124 Ariz. 525, 606 P.2d 15 (1980), he contends that at the time the petitioner was sentenced jeopardy attached. *State v. Burruell,* 98 Ariz. 37, 401 P.2d 733 (1965), is also cited.

We do not disagree with these general propositions of law. The petitioner, however, entered into a plea agreement with the state which by its very terms waives the defense of double jeopardy if the agreement is violated. Obviously a defendant can by agreement waive Constitutional rights. *See* 17 A.R.S. Rules of Crim.Proc., rule 17.2(c). Having determined that the state should proceed with a "reinstated' 'information pursuant to the plea agreement, we need not consider the double jeopardy implications of proceeding under a new information.

It is ordered that the relief sought by petitioner is denied. It is further ordered that the new information filed in cause number CR-93385 is dismissed, the judgment of conviction and sentence heretofore entered in cause number CR-93385 are vacated and the original information in said cause charging open murder is reinstated. Further ordered that this cause is remanded to the Honorable Ben Birdsall sitting in Pima County for further proceedings in conformity with the opinion.

The mandate shall issue forthwith.

STRUCKMEYER, C. J. HOLOHAN, V. C. J., and CAMERON and GORDON, JJ., concur.

U.S. District Court

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

[Adamson v. Hill]

(Filed June 20, 1980)

The Petitioner, JOHN HARVEY ADAMSON, by by and through his attorneys undersigned, submits the following Supplemental Petition for Writ of Habeas Corpus pursuant to 28 U.S.C., §2254, and for said Supplemetntal Petition alleges as follows:

I

This Petition is filed pursuant to 28 U.S.C., §2254, et seq.

II

On June 13, 1976, the Petitioner was arrested for the murder of Don Bolles, alleged to have occurred on June 2, 1976 in Phoenix, Arizona. Subsequent to that date, an Information was filed in Maricopa County Superior Court, Criminal Cause No. 93385, charging the Petitioner with murder, open.

III

The Petitioner was held in custody without bond. The minute entry evidencing trial court's determination that Petitioner was not entitled to bail is attached hereto, denoted as Exhibit "A" and incorporated by reference herein.

IV

On January 15, 1977, after a change of the place of trial, Petitioner entered into a plea agreement with the State of Arizona agreeing to plead guilty to murder, second degree, in exchange for a sentence of forty-eight (48) to forty-nine (49) years imprisonment with a release date of twenty years two months to date from June 13, 1976. Said plea agreement called for Petitioner's testimony in a number of criminal prosecutions including any having to do with the killing of Don Bolles. That plea agreement is attached hereto, denoted as Exhibit "B" and incorporated by reference herein.

V

On January 15, 1977, Petitioner entered his plea of guilty pursuant to the said plea agreement and on January 19, 1977 the trial court accepted the terms and conditions of the agreement. The trial court's minute entries of January 15 and January 19, 1977 are attached hereto, denoted as Exhibits "C" and "D" and incorporated by reference herein.

VI

On December 7, 1978, judgment of guilt as to the Petitioner was entered by the trial court and pursuant

to the agreement the Petitioner was sentenced to 48 to 49 years imprisonment. The trial court's minute entry of December 7, 1978 is attached hereto, denoted as Exhibit "E" and incorporated by reference herein.

VII

During the period of time from January 19, 1977 to December 7, 1978, pursuant to the plea agreement, Petitioner testified a trial in State of Arizona vs. Stan Tanner and James Robison regarding the alleged beating of talent agent, Les Boros. During this period of time, Petitioner testified at the preliminary hearing and at trial in State of Arizona vs. Max Dunlap and James Robison in connection with the alleged murder of Don Bolles. Further, during this same period of time, Petitioner testified at trial in United States of America vs. James Robison and Neil Roberts in connection with the alleged attempted bombing of the Bureau of Indian Affairs Building in Phoenix. All of the defendants were convicted of the criminal offenses with which they were charged.

VIII

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison for the murder of Don Bolles. Thereafter, Petitioner, in a good faith belief that he had complied with all of the terms and conditions of the plea agreement, in a letter from his attorney to the Attorney General of the State of Arizona, set forth the conditions on which he would testify at the retrials of Mr. Dunlap and Mr. Robison. That letter is attached hereto, denoted as Exhibit "F" and incorporated by reference herein.

IX

On April 9, 1980, in response to Petitioner's letter, the Attorney General of the State of Arizona responded in writing and informed the Petitioner that by virtue of his position as set forth in his letter, Petitioner would be considered to be in violation of the plea agreement and subject to prosecution once again for the murder of Don Bolles. That letter is attached hereto, denoted as Exhibit "G" and incorporated by reference herein.

X

After unsuccessful attempts by the State of Arizona to compel the Petitioner to testify at certain pre-trial hearings regarding Mr. Dunlap and Mr. Robison, said attempts being directed at the trial court and the Arizona Supreme Court, the prosecution filed a new Information in Maricopa County Criminal Cause No. 93385 on May 8, 1980 against the Petitioner alleging the murder of Don Bolles. A warrant for Petitioner's arrest issued. The new Information and the warrant for Petitioner's arrest are attached hereto, denoted as Exhibits "H" and "I" and incorporated by reference herein.

XI

Petitioner filed a motion on May 9, 1980 to quash the arrest warrant and strike the information from the file. Petitioner's motion is attached hereto, denoted as Exhibit "J" and incorporated by reference herein.

XII

On May 12, 1980, the Honorable William P. French, Judge of the Maricopa County Superior Court, denied

Petitioner's Motion to Quash the Warrant and Strike the Pleadings. A copy of the court's minute entry is attached hereto, denoted as Exhibit "K" and incorporated by reference herein.

XIII

On May 13, 1980, Petitioner filed in the Supreme Court of the State of Arizona a Petition for Special Action citing abuse of discretion on the part of Judge French in denying Petitioner's Motion to Quash the Warrant and Strike the Pleadings. Further, Petitioner alleged that a second prosecution was in violation of the double jeopardy clauses of the United States and Arizona Constitutions. The Petition for Special Action is attached hereto, denoted as Exhibit "L" and incorporated by reference herein.

XIV

After a hearing on May 28, 1980, the Arizona Supreme Court on May 29, 1980, filed their written opinion denying Petitioner's relief prayed for in his Petition for Special Action. The Court, acting in an arbitrary and capricious manner and abusing its discretion, (1) found that the Petitioner was in violation of his plea agreement and had waived his claim to double jeopardy, (2) dismissed the new Information filed in Cause No. CR-93385, and (3) vacated the conviction of the Petitioner and the sentence imposed in that cause number and reinstated the original Information charging open murder. The mandate issued forthwith on that date. The Court's written opinion is attached hereto, denoted as Exhibit "M" and incorporated by reference herein.

XV

A determination was made by the Arizona Supreme Court that Petitioner was in violation of the plea agreement when no evidentiary hearing had been conducted. The fact-finding procedure employed by the Arizona Supreme Court was not adequate to afford a full and fair hearing and, in fact, the material facts regarding the issue of the violation of the agreement were not adequately developed at the lower court level and, accordingly, Petitioner was denied his due process rights guaranteed by the United States and Arizona Constitutions.

XVI

On June 6, 1980, Petitioner appeared before the Honorable Ben Birdsall of the Pima County Superior Court and a trial date was set for July 29, 1980. Petitioner remains in custody in this matter without a bond.

XVII

Petitioner has exhausted all available State remedies in an effort to obtain relief on the issue of double jeopardy.

XVIII

If Petitioner is permitted to be prosecuted again for the murder of Don Bolles, having been once convicted, sentenced, and having served approximately four years of said sentence for the murder of Don Bolles, a second prosecution will be in violation of the Petitioner's Constitutional right to be free from being placed "twice in jeopardy" for the same offense. Further, to subject

Petitioner to prosecution again creates such a threat of great immediate and irreparable injury to Petitioner that there exists at the present an extraordinary pressing need for immediate Federal equitable relief in the form of an immediate stay of the State Court proceeding to preclude the State of Arizona from continuing this flagrant, bad faith attempt to deny Petitioner his Constitutional rights.

WHEREFORE, the Petitioner, JOHN HARVEY ADAMSON, prays this Honorable Court order that the Respondent Attorney General for the State of Arizona file a response or other appropriate pleading in this matter; that this matter be set for a hearing before a Judge of this Court; that an Order staying all further proceedings in Maricopa County Superior Court Criminal Cause No. 93385 be entered until this Court can resolve the issues now before it presented by this Petition; and that upon conclusion of the proceedings that a Writ of Habeas Corpus issue from this Court directing the Respondents to cease and desist from and to terminate the prosecution of the Petitioner.

RESPECTFULLY SUBMITTED this 20th day of June, 1980.

MARTIN & FELDHACKER

By: /s/ Gregory H. Martin

By: /s/ William H. Feldhacker
5829 N. 7th Street, Suite 1-C
Phoenix, Arizona 85014
Attorneys for Petitioner

STATE OF ARIZONA)
) ss:
County of Maricopa)

JOHN HARVEY ADAMSON, being first duly sworn, deposes and says:

That he is the Petitioner in the foregoing matter; that the matters set forth therein are true; that those alleged on information and belief, he believes to be true.

/s/ John H. Adamson

SUBSCRIBED AND SWORN TO before me this 20th day of June, 1980.

/s/ William H. Felhacker
Notary Public

My Commission Expires:

Illegible

[Caption omitted]

(p. 2.) U.S. DISTRICT COURT

Phoenix, Arizona

September 26, 1980

PROCEEDINGS

The Clerk: Civil 80-502 Phoenix, John Harvey Adamson versus Jerry Hill, et al., on for Petitioner's Writ of Habeas Corpus and State of Arizona's Motion to Dismiss.

The Court: Yes?

Mr. Martin: Gregory Martin, William Feldhacker, for the Petitioner, Your Honor. We are ready.

The Court: Are you ready to go ahead?

Mr. Schafer: Bill Schafer from the Attorney General's office.

The Court: Go ahead. I have read what you have to say so please emphasize whatever you wish to emphasize.

Mr. Martin: It's certainly not my intention to reiterate orally what I have set forth in writing. We have briefed it quite extensively. I would like to make a very short statement regarding our position and by its nature I think I will touch upon some of the matters that I have covered already.

As you are aware, Mr. Adamson entered into a plea agreement whereby he agreed to plead guilty to murder (p. 3) in the second degree and to a stipulated sentence; in exchange he further agreed to cooperate in a number of anticipated prosecutions and he did cooperate with the State of Arizona in that regard and with the U.S. Government. Judgment of guilty was entered and he was sentenced in December of '78.

After Mr. Dunlap and Mr. Robison's reversal of the convictions sustained by them in the State Superior Court, Mr. Adamson indicated to the State that he wanted further concessions from the State for any additional cooperation on his part.

Our position, your Honor, is that Mr. Adamson has fully and completely fulfilled his obligations under that plea agreement.

Now, the Arizona Supreme Court stated in their opinion that the agreement contemplated his availability at any re-trial of Mr. Dunlap and Mr. Robison should their conviction be reversed. That is simply not true—it's our position. Mr. Adamson expressly agreed to testify fully in all of those matters and he further waived the time for sentencing and he agreed to be sentenced only after completion of his testimony in all of those cases. The State of Arizona requested that he be sentenced in December of 1978 not Mr. Adamson.

To protect itself, all the State of Arizona (p. 4) had to do was to postpone Mr. Adamson's sentencing to which he had expressly agreed and he would have been obligated to testify at any re-trial regarding Mr. Dunlap and Mr. Robison. I would hope that this Court would not share the opinion that I assume Mr. Schafer has at this point in time in connection with the fact that the entry of judgment and the imposition of sentence in this case is a mere ritual, as he has said before, and virtually meaningless. It's our contention that the entry of judgment and the sentence imposed was totally significant and in fact signaled an end the Mr. Adamson's obligation to testify.

The Court: Why do you have a plea agreement then? Don't you have a plea agreement as sort of a quid pro quo?

Generally the theory behind a plea agreement of that type is that somebody will testify for the purpose of doing a certain thing and in return for that, get preferential treatment. If the doing of a certain thing you would argue, of course, has been done, the State would argue it hasn't been done because the conviction was set aside. I assume the State had in mind that it would be seen through to the end of a conviction or a determination of not guilty—the parties against whom he testified in any and all trials, and for that reason they would say, that is why you would not have a trial against you for murder, first degree murder.

(p. 5) Mr. Martin: I'm not sure what the State had in mind at the time they initially entered into the agreement in January of '77.

The Court: You would think the State would have in mind, in any event, that a person would have preferential treatment on a first degree murder charge with the notion that the other parties might—if there were a re-trial that that would be the end of the obligation?

Mr. Martin: I don't doubt that they probably had it in mind that they wanted Mr. Adamson available at retrial. The only problem is that they didn't make that known to Mr. Adamson and that was not the part of the agreement that was entered into by Mr. Adamson. What he agreed to do was in essence—

The Court: (Interposing) Any and all trials.

Mr. Martin: Yes, and he agreed to waive his time for sentencing and he agreed to be available at all trials prior to sentencing and all they had to do was to postpone the sentence until they were sure if in fact the convictions were reversed that he would be available at the end. All they

had to do was postpone his sentencing and he would have been available because he expressly agreed to that. But when they sentenced him, judgment was entered. It signaled an end to the proceedings, an end to his obligations, and a finality at least at the trial court level (p. 6) to this particular case. And I think it's simple now because he is being prosecuted in Tucson. He is being twice placed in jeopardy. It's a fundamental constitutional guaranty that he has, and accordingly you have jurisdiction to resolve this dispute.

The Court: He would only be twice in jeopardy if in fact the plea agreement had not been violated and the State did not have a right to try him, if he violated his plea agreement.

Mr. Martin: It's our position he fulfilled the obligation of the plea agreement. Thank you.

One other thing. If you are not prepared to rule today we would ask that an order issue from this Court staying the proceedings which are now pending in the Pima County Superior Court.

The Court: I will be prepared to rule today because I have considered the whole matter very carefully and I just wanted to hear what you all had to say.

Mr. Schafer: May it please the Court. I, too, will be short. I know you have reviewed these as you do in every case.

As to the first point, we have argued in our brief before the Court that for the Petitioner to go back at this time and re-argue the original plea agreement is not a Federal question. That is a State question, which should (p. 7) not be handled on habeas corpus.

I have cited just about every close case I could find to the Court but I confess I could not find any on plea agreements. I think I found some close cases, but that is all

The Court: Doesn't any matter that raises a question on the constitution that has been adjudicated in the State Courts—isn't this a matter, then, that can be presented to the Federal Court?

Mr. Schafer: It certainly is, and that is my second point, that that issue is here. I have said that in the brief. The double jeopardy issue. The issue, however, of what is meant by the plea agreement is not here. The only issue that we submit that is here at all is, once having determined, as the highest court in the State has, that the plea agreement was broken and that it was voided, may Mr. Adamson now be tried for the first time for a first degree murder, and I really see that as possibly two issues.

The one is the general issue, can he be tried at all? Does double jetopardy prevent his now being tried for anything? In this case we are only concerned with two degrees of murder, and I think I have argued to the Court basically in our memo that constitutional rights including the Fifth Amendment double jeopardy right can be waived, and our argument is that in this situation in these circum- (p. 8) stances Mr. Adamson has knowingly, intelligently and upon the advice of counsel waived any right he would have to claim double jeopardy.

The Court: There is no question constitutional rights can be waived. When you waive your right to a jury trial you are waiving your right to a constitutional right. When you waive your right to have a case presented to a Grand

Jury you are waiving your constitutional right. So there are many constitutional rights that can be waived, if they are knowingly and intelligently waived.

Mr. Schaffer: We maintain the double jeopardy right is also one of those. That has been questioned in some cases. The latest U.S. Supreme Court case I have been able to find is Menna versus New York,——I believe it is 423 U.S.——and in footnote 23 in that case, because it might appear from a reading of the opinion itself without the footnotes that what the Court is saying is, you cannot waive your Fifth Amendment double jeopardy rights but the footnote says we are not intending to hold that. All we are passing on in this case is an interpretation of the Tollett versus Henderson case. That is our first point: that Mr. Adamson waived his rights to double jeopardy and may now be tried for murder.

The second ancillary issue is, I suppose, if that is true, may he also be tried for first degree murder because (p. 9) he only pleaded to second degree murder and there are, I am sure the Court is aware, a host of cases talking about a jury finding impliedly or explicitly, a defendant not guilty of a higher charge—but convicting him on the lesser charge.

To answer that contention I have cited the Court I believe nine different cases, six of them being Federal opinions to show specifically in a plea bargain situation that where the initial higher charge is dropped in return for a plea to a lesser charge, there can be a trial on the higher charge. As a matter of fact Santobello—perhaps the seminal case on plea agreements and negotiations—also says that in the footnote. In that case I believe there were

two charges dropped. The Court states in it's [sic] opinion that the defendant pleaded guilty to a lesser included charge. In the footnote they say, of course, when this goes back to trial court, he will plead to the original charges. There is dicta in a 9th Circuit case, U.S. versus Wells following up on Santobello saying the same thing. Of course, when this individual goes back he will have to answer to the higher charges.

We submit that on the basis of the cases that we have submitted to the Court, and I couldn't find any to the opposite. There is one case that I have cited that held the opposite, but that was overturned. At this point (p. 10) I believe that all of the authority that I could find, I believe all the authority that anybody could find, would show that an individual in a fact situation like Mr. Adamson can be tried on the original higher charge that was dropped initially.

The Court: Well, and the knowing and voluntary agreement is null and void and the original charge would be automatically reinstated in the event of the breach of the agreement and the agreement you read as being one that he is willing to testify at any and all trials including any retrial and that having not so testified, having refused to so testify, and having entered into the agreement we just discussed, he has violated that and therefore he has waived any right for claiming of double jeopardy even though he had previously been sentenced.

Mr. Schafer: Yes, and I would add to that not only the agreement itself but when he orally entered his plea before Judge Birdsall, every paragraph of the plea agreement was gone over and he was asked with his attorneys

present if he understood what was being said and what was being agreed to and he agreed to every paragraph including that one. And again at the judgment and the sentencing, there was a statement in the record showing that this was all known, understood and agreed to.

I have nothing further, Your Honor, unless (p. 11) there are questions.

The Court: Go ahead. No, I have no questions. Do you wish to reply?

Mr. Martin: The only thing I would say in reply, Mr. Schafer initially said that with respect to what is meant by the plea agreement question that you should concern yourself with—what is meant by the plea agreement is not a question that you should concern yourself with. I disagree because at the State Court level there was never any type of a hearing held to determine in fact, for instance, as regarding the question you posed to me, what was in the State's mind. What did the parties agree to when they entered into this agreement in January of 1977? There was never a hearing held on that issue—notwithstanding that, the Arizona Supreme Court found that he was in violation.

The Court: Didn't the Respondent ask the Supreme Court to take jurisdiction of the action and decide whether the Petitioner is obligated under his agreement? Didn't they put that before the Supreme Court?

Mr. Martin: What we did was simply, it was an attempt to test Judge French's ruling which was based on the record.

The Court: You are not really answering my question. Wasn't that put before the Supreme Court in those (p. 12) words? I am looking at Respondent's memorandum at 4. They asked the Supreme Court to take jurisdiction of the special action and decide the issue whether the Petitioner is obligated to testify under the agreement and there was no objection as the record discloses on your part to that issue being put before the Supreme Court.

Mr. Martin: I don't have the Petition before me but I am sure that is what it says. What I am trying to say now is that notwithstanding that, the hearing wasn't afforded Petitioner and it reaches constitutional dimensions because he has not been afforded due process and that should concern you in connection with the interpretation of the plea agreement. That is all I have.

The Court: Well, I will have a written order within an hour on this matter. Thank you.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-502 PHX CAM

JOHN HARVEY ADAMSON,)
Petitioner,)
vs.) ORDER
JERRY HILL, Sheriff of Maricopa)
County; State of Arizona; et al.,)
Respondents.)

(Filed Sept. 26, 1980)

This Court, having received and considered Petitioner's Petition for Writ of Habeas Corpus, Supplemental Petition for Writ of Habeas Corpus, and Memorandum in Support of Petition for Writ of Habeas Corpus, filed June 25, 1980, and having entered an Order on June 25, 1980, granting Respondent twenty days in which to respond, and having received and considered Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus, filed July 21, 1980, and Petitioner's response thereto, filed July 31, 1980, finds and concludes as follows:

1. That Respondent has failed to reply within the five (5) days allowed by Rule 11(d), Local Rules of Practice, and is therefore considered to have waived the opportunity to reply to Petitioner's response to Respondent's Motion to Dismiss;

2. With respect to Petitioner's contention that the Arizona Supreme Court's ruling that Petitioner had breached his plea agreement violated his right to due process of law, this Court finds and concludes as follows:

(a) That in Respondent's memorandum in support of its Response to Request for Special Action, dated May 16, 1980, Respondents urged the Arizona Supreme Court to "take jurisdiction of this special action" and decide the issue "whether petitioner is obligated to testify under his agreement". Respondent's Memorandum at 4.

(b) That Petitioner does not allege, and the record does not reflect, that Petitioner objected to the State Supreme Court's resolution of the above issue.

(c) That the opinion of the Arizona Supreme Court in this matter discloses that Petitioner was given the opportunity at oral argument to disclose "the basis for his contention that he had fully complied with the terms of the plea agreement and no longer had an obligation to testify further." *Adamson v. Superior Court*, No. 14898 (Az. S.Ct. May 29, 1980), at 8.

(d) That, in addition to oral argument, the record disclosed that the state court also considered the plea agreement itself, the transcript of Petitioner's change-of-plea hearing, and a letter by Petitioner's counsel to the Assistant Attorney General, dated April 3, 1980, representing Petitioner's position that

> his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will be given only upon the offer of further [specified] consideration by the State of Arizona

and further stating that Petitioner

> is well aware of the fact that your office may feel that he has not completed his obligations under the plea agreement . . . and, further that your office may attempt to withdraw that plea agreement from him . . .

> [and] that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

3. With respect to the issue whether the State's reprosecution of Petitioner violates the double jeopardy clause of the fifth amendment, this Court finds and concludes as follows:

(a) That Petitioner's refusal to testify at the retrials of Dunlap and Robison violates his plea agreement and, under the terms of that agreement, said refusal constitutes Petitioner's consent that the "agreement is null and void and that the original charges will be automatically reinstated."

(i) This Court having considered the entire record before it further finds and in the alternative agrees with the findings of the Arizona Supreme Court that

> Although the plea agreement does not specifically spell out the duration of petitioner's obligation, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hestitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

Adamson v. Superior Court, supra, at 7-8. See ¶¶ 4 and 5 of Petitioner's Plea Agreement.

(ii) That ¶ 8 of Petitioner's agreement, which states that the parties would "waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement, and Exhibits A and B which accompany

it," cannot be interpreted as a statement that Petitioner's obligations pursuant to the agreement would cease upon his sentencing, but rather was intended, and the Arizona Supreme Court found, to fix a time for sentencing, *Id.* at 9-10.

(b) That the record establishes that Petitioner's consent that the "agreement is null and void and the original charges will be automatically reinstated" in the event of a breach of the agreement, constitutes a knowing and voluntary waiver of the defense of double jeopardy.

(i) In this regard, we agree with the Findings of the Arizona Supreme Court that, Petitioner was aware at the time he entered his plea that his obligation to testify regarding the crimes referred to in the agreement would continue until the matters were resolved—regardless of whether he was sentenced prior to that time. *Id.* at 9.

(ii) That ¶ 8 of Petitioner's agreement *see supra* at ¶ (3)(a)(ii), was not intended, nor can it be interpreted as a statement that Petitioner's obligations pursuant to the agreement would cease upon his sentencing, but rather was intended to fix a time for sentencing and to insure that Petitioner would waive any defenses that might otherwise result from the delay. *Adamson v. Superior Court, supra,* at 9-10.

c) That, in view of the foregoing; Petitioner cannot now claim that his reprosecution is barred by the double jeopardy provisions of the fifth amendment of the United States Constitution.

4. That for the above reasons, Petitioner's Petition for Writ of Habeas Corpus, upon reconsideration, is

deemed legally frivolous and Respondent's Motion to Dismiss is hereby granted.

DATED this 26 day of September, 1980.

/s/ C. A. Muecke
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-502 PHX CAM

JOHN HARVEY ADAMSON,

PLAINTIFF,

vs.

JERRY HILL, Sheriff of Maricopa County,
State of Arizona, et al.,

DEFENDANT.

October 21, 1980

ORDER

This Court, having received and considered Petitioner's Motion for Amendment of the Court's Findings and Amendment of the Judgment, the exhibits attached thereto, the State of Arizona's Response, and the Petitioner's Reply, finds and concludes:

(1) That it is neither the intent nor the purpose of a Motion for Amendment of Findings to allow a party to relitigate the merits of a case or to present evidence for the first time, which could have been presented originally. F.R.Civ.P., Rule 52(b); Wright and Miller, *Federal Prac. and Proc.*, § 2581, p. 722, and the cases cited therein.

(2) That even had the matter been appropriately presented to the Court, the Motion does not justify the relief requested by the Petitioner;

(a) The record does not establish that petitioner objected to the Supreme Court's disposition of the issue as to whether the petitioner had breached the Plea Agreement;

(b) In fact, the transcript of the parties' arguments in front of the Arizona Supreme Court reveals that the attorney for the Petitioner discussed at length the merits and substance of the agreement. (Transcript at p. 6, 1.15, through p. 8, 1.1);

(3) That even had the Petitioner presented a meritorious claim in a procedurally correct manner, where the question is a matter of state law (i.e. the interpretation of a plea agreement), the lack of an evidentiary hearing is not a ground for federal habeas corpus relief. Townzen v. Craven, 444 F.2d 315 (9th Cir. 1971).

Therefore,

IT IS ORDERED that petitioner's Motion for Amendment of the Court's findings, Amendment of the Judgment, and Vacation of the Order of the Arizona Supreme Court is denied.

/s/ C. A. Muecke
Chief
United States District Judge

cc: Martin & Feldhacker
Attorney General

(p. 68) In The Superior Court of Arizona

Sentencing
Nov. 14, 1980
[excerpt]

• • •

The Court: All right. Mr. Adamson.

The Defendant: Yes. Would it be more convenient for the Court if I took the witness stand or would it be more convenient if I addressed the Court from here?

The Court: You may address me right from there unless you prefer to take the stand.

The Defendant: I prefer to take the stand, if I might, Your Honor.

The Court: All right.

The Defendant: It this on? Yes.

First of all, Your Honor, I would like to apologize to the Court for my appearance today. It seems that Mr. Right Hand was given my suit to have cleaned and Mr. Left Hand was supposed to deliver it and Mr. Left Hand never showed up.

Your Honor, the answer to the question is I don't know. The question is, how did we get here from there?

The State's argument, which has been very effective today, is that it's really a very simple matter. Either the plea agreement has been violated or it has not (p. 69) been violated, and if it has been violated then this is the penalty that's called for in it.

I contend that it is not a simple matter of whether or not the plea agreement has been violated and the reason that it is not a simple matter is because of a word near and dear to everybody's heart by now, particularly Max Dunlap, Jimmy Robison, Neal Roberts, Kemper Marley, and now the great possibility of others, immunity.

I was never afforded the opportunity of refusing to cooperate and could not because of the threat of prosecution to answer questions to me posed by the State of Arizona allowing it to become the simple matter the State contends that it is.

I submit to this Court and parties present that it is not a mere simple matter, but a very complex series of occurrences if that's all it is.

Since coming to Tucson and all the exposure I have had to this Court three things particularly stand out in my recollections and always have.

One, the Court's fairness; two, the Court's intelligence; and, three, the Court's attention to detail and thoroughness.

That is why in 1977 when the Court accepted and signed the plea agreement which at that time had been (p. 70) negotiated between the State of Arizona and my lawyers I paid particular attention to the rights that I was waiving, and in particular to the 30-day sentencing provision as stipulated and based on Your Honor's findings at the time. I understood I would not be sentenced until my testimony was concluded and the State, and since you were a party to the agreement, you, Your Honor, were also satisfied that I had lived up to my end of the contract. In effect what I had done by waiving my time for sentencing until the State of Arizona was satisfied, was effectively giving them 20 years, one month and 29 days because what was determined my time for sentencing was not tied to a time, it hinged on my performance and when that performance was concluded to be determined again with the State of Arizona.

As long as I was sentenced prior to the expiration of my 20 year two month period of incarcaration, and certainly common sense dictated then as it does not that I

couldn't be sentenced after my period of incarceration, so just to make sure I looked up the word conclusion. It has been years since I have done this, but I recall that it meant the final act of a legal pleading or trial.

Thinking I may have perhaps by chance misunderstood something, I looked up the word final, and (p. 71) again it's been years, but I think I recall the definition of the word final meaning the unalterable end.

In short, between my own observations, my lawyers' advice, and the absence of anything in the record from this Court and anything in the contract itself, to me there was only one reason to sentence me. As Paragraph 8 of that plea agreement says, to conclude my testimony at such time the charges would be dismissed and that to me signalled finality, an end, a time when everybody was satisfied that I had told the truth, that I had done whatever I said in the plea agreement that I was going to do according to the terms of that agreement.

My thanks for cooperating according to that agreement was my sentencing.

When the State had determined I had fulfilled my promise under the agreement, Bill Schafer contacted my lawyers and indicated it had been determined it was time to sentence me. My lawyers then inquired at that time, Mr. Schafer, are you sure you want to sentence John Adamson? Don't you want to wait until some of these appeals are back on—on—particularly the Bolles case, before he is sentenced?

Mr. Schafer said, no, it's time for John to be sentenced.

My lawyers again said, are you sure you (p. 72) want John Adamson sentenced?

Mr. Schafer again said, yes, it's time. So as Your Honor well knows I was sentenced.

The hearing—the State mentioned the possible need for further testimony in the Asher [sic] plumbing matter which wasn't mentioned directly by name, but had been discussed between my counsel and the State. And I felt then, and as I do today, that since that case was originally part of that plea agreement I was honor bound, if not legally bound, after my sentencing to cooperate with the State of Arizona since in fact in my own mind that was part of the consideration that I was receiving for my honest and truthful testimony.

So I said, yes, certainly, of course, there is no problem in calling me back for further testimony in that case.

After the sentencing Bill Schafer even admitted to my lawyers that he really didn't know what could be done now that I had been sentenced now that the case was reversed. But more importantly, he hadn't precluded the possibility of my improving my position by further negotiation if in fact the Bolles case was reversed, especially in light of future cooperation he was now aware of I had agreed to tender if the federal agencies and others in the prosecution of others in some (p. 73) very serious matters and an agreement that I was later to arrive at in 1979 with the Department of Justice in that pursuit.

While it wasn't stipulated or specifically understood, it left the situation I describe open, but perhaps ambiguous. I was sentenced, of course, December 7, 1978, and according to conversations with Mr. Jennings preceding that, went into federal custody on December 8th.

In 1979 I returned and testified in the Verive case without any inducement as you have heard today, without an

agreement, just because I was asked. And I entered into an agreement with the federal government the same year wherein I was to provide information and testimony in other serious criminal matters, to be kept in federal custody in a witness protection program as long as I felt there was a threat to my life. And I began providing information at that time and have continued to do so presently.

On February 25th, of course, the Bolles case was reversed. Because I had been forced to take the Fifth Amendment due to the lack of immunity, not allowing me to answer the questions, immediately the question of my legal responsibilities under the plea agreement came to mind and in discussion with my attorneys preliminary indications were that the agreement had been concluded (p. 74) with my sentencing, but certainly that it was a legal issue and a hearing would—would provide the answers. It would determine whether or not, in fact, our position was right or perhaps that it was wrong, but at least I would be entitled to a hearing to determine where—where both parties' legal positions stood.

And in particular, after Bill Schafer's statement to my lawyers after the sentencing that—I felt that it was ambiguous, that there wasn't a—a full, complete understanding as to what the State's understanding of the plea agreement was or—or my responsibilities under it, and certainly I realized after the court experiences I have had this is only my opinion as to what this contract meant. So, again, I was thinking there was going to be a hearing certainly over the legal issue of where everybody stood according to the agreement.

A brief period of time following the reversal, Bill Schafer in an interview with a newspaper reporter in Phoenix by the name of Pat Zabo indicated that a new agreement could be negotiated with either side negotiating more.

This confused me a little bit, for why is it the State would want to renegotiate more from me when I had done everything I said I was going to do under the plea agreement as evidenced by the fact that they had (p. 75) thanked me for my cooperation and agreed I had done everything I was supposed to do by the mere fact that I had been sentenced by Your Honor. I couldn't understand that. It didn't make sense to me. Why would they want more from a witness that--that had testified for them, provided evidence for them, and in short did everything that was legally required of him? I didn't understand it.

The only thing I can see that—the way the State could renegotiate more from me was to charge me with an additional crime or crimes.

So in good faith I entered into plea negotiations with the State of Arizona through my lawyers, not wishing to communicate directly with them because of what may have meant by them wanting more and perhaps them filing new charges against me.

These negotiations culminated with my letter to the State of Arizona dated April 3, 1980, which by now has become infamous, wherein, among other demands, I demanded my release from the penitentiary after the first retrial of Max Dunlap after it became obvious to me the State was not going to start the process by even asking for my cooperation by saying please.

In short, Your Honor, I asked for the moon and I don't know what the usual process is for negotiating a plea agreement, but that's the way I started with it. (p. 76) It may be considered untutored, and perhaps it was in error, but it was done in good faith.

And there still at that time remained the legal issue of what my responsibilities were under the '77 plea agreement if any. But my position was and still is that my agreement was concluded with my sentencing. For as long a time as the State needed I had given them by waiving my time requirements for sentencing at which time the heat from the Bolles case would have died down, I could have changed my name and records, and faded into the general population of some institution and finished the remainder of my 48- to 49-year sentence because there was no plan in cooperating any further with anybody at the time the plea agreement was negotiated other than the four cases that were mentioned in it.

The Court: Just one second. You're reading and that causes you to go faster than you might ordinarily. I want to make certain the court reporter gets this.

The Defendant: I'm also a little bit nervous, Your Honor.

The Court: Just give him a rest for a minute.

The Defendant: Okay.

The Court: Then if you can, go just a little slower. I don't mean real slow.

The Defendant: I understand. I apologize.

(p. 77) On April 9, 1980, the State of Arizona sent me a letter not asking for my cooperation, but rather saying I had violated the plea agreement and was going to be tried—charged and tried for first degree murder, that they, the State, apparently had determined that I had violated the plea agreement by refusing to be interviewed. This left me more perplexed for how could I have violated the agreement

by trying to negotiate one based on their representation and with no hearing being held to determine the legal position of either party based on the evidence presented and the prevailing case law which applied to the situation by a Judge. And who better to determine if the plea agreement had been violated than Your Honor, the Judge who accepted and signed it.

I was subpoenaed to Judge Myers' court to testify at a bond hearing for Max Dunlap Friday, the 18th of April, 1980. At that hearing I answered the one question I could answer, did you tell the truth at the preliminary hearing against Max Dunlap? To which I answered yes.

But because of the State's representation that they were going to try me for first degree murder, and on advice of counsel, I took the Fifth Amendment some 136 times, I think it was, and again found myself (p. 78) without enough immunity to answer the questions which were posed to me.

The State filed first degree murder charges against me Thursday, May 8, 1980, I think was the date, for the Bolles killing.

I now stood charged with a crime to which, one, I had already been charged; two, plead guilty to; three, been found guilty of; four, had been sentenced because of to 48 to 49 years to be served 20 years two months from June 13, 1976, day for day with no good time available on the sentence of any kind; and, five, had served now some 47 months of that sentence.

I was more confused for it made no sense to me at all if convicted what sentence was I to serve first, the one I already had or the one I was going to get or would they run concurrently.

Some of my questions were answered yet still more posed. Friday, May 30, 1980, I believe was the day when the Arizona Supreme Court, I contend still with no hearing and without being requested, ruled that I had violated the plea agreement and vacated my 48- to 49-year sentence and opened up final judgment by ordering that I be tried for first degree murder.

The following Monday—Monday, June—June 2nd, I call my lawyers and it was arranged to—(p. 79) Stan Patchell from the Attorney General's Office was present in their office. I stated that while I felt uncomfortable from a legal standpoint, particularly a due process standpoint, and I felt that jeopardy had been attached at the time of my sentencing, that the only right thing for me to do under the circumstances, since there now in fact had been a judicial determination that the plea agreement had been violated, was to continue the cooperation.

I told my lawyers, reinstate the 20-year plea agreement, give me enough immunity so I can answer the questions, and we'll continue prosecuting the case.

The State found that unacceptable. They demanded a life sentence of 25 years. Now, instead of saying please they were saying thank you by adding nine years onto my sentence. The four years I had already served, which was vacated, and the additional five years of a life sentence.

On Wednesday, August 6, 1980, I was withdrawn from federal custody, violating the agreement I had signed with the Department of Justice keeping me in federal protective custody because of the severe danger to my life in return for me providing information and testimony against others.

On Wednesday, August 27th, with no agreement, (p. 80) inducements, and while awaiting trial for the first

degree murder charges here in this court, as I had indicated to Ron Jennings a long time previously, I went before a Federal Grand Jury in Phoenix in which three indictments were returned over a bombing in 1975. That trial, I believe, is set in January 1981 in San Diego and I will testify in that trial.

Again, on Friday, September 12, 1980, with no inducements or agreements and while in the process of jury selection on this matter here, again as I represented to Mr. Jennings a long time ago, I was taken to San Diego for the retrial of the B.I.A. case against Jimmy Robison and Neal Roberts. But a delay by the Ninth Circuit Court of Appeals in that case precluded trial at that time. When scheduled I will testify in that trial, Your Honor.

A phone call to Ron Jennings Tuesday, September 30, 1980, while in jury selection here in Tucson, Mr. Jennings discussed the severe danger to my life and it would be to everyone's benefit if I could consider pleading to first degree murder and an additional 50 federal years, the State time to run concurrent with the Federal time, if possible, when my sentencing was concluded and again I had lived up to my promise under the new contract to negotiate with the State of Arizona. So at least I could get back in federal custody where my (p. 81) safety could be assured.

I don't know if anybody in this courtroom has done time, but it doesn't go any faster because you say it quick. That's a lot of time.

I said, yes, that I would do that. I would plead guilty to a life sentence and an additional 50 federal years under those conditions so that I could get back in federal custody where I would be safe.

On Monday, October 6th, he indicated that the Attorney General had said no, they would not be returning me to Federal Court custody.

As everybody knows on October 17, 1980, which was a Friday, I was convicted in this court of first degree murder in the Bolles homicide.

And on Tuesday, October 28, and again on Wednesday, October 29, consistent with my representations to Mr. Jennings, I testified at a hearing on the Top's Tavern matter without any inducements, without any agreement.

Your Honor, when granted enough immunity, I have never once refused to give evidence or testify when asked. Never. And I contend I have never violated any agreement. Never. I have never lied. Never. Quite to the contrary, Your Honor.

In January of 1977 to date I have proffered (p. 82) hundreds and hundreds of pages of statements consisting of literally thousands and thousands of questions that have been asked of me.

I have now made 14 court appearances to date on five separate cases consisting of approximately 31 days of testimony. These cases have been heard by eight different Judges, three of them Federal Judges and one Federal Magistrate. Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions.

I have been cross-examined under oath for approximately 190 hours by some of the most brilliant legal minds in the country and some most skilled in the art of cross-examining. In all I have been examined and cross-examined and re-examined by 22 different attorneys, ten defense

attorneys the likes of Percy Foreman, John Flynn, Paul Smith, seven state and local prosecutors, five federal prosecutors.

Totally 21 investigators have also examined, re-examined, and cross-examined me, five Alcohol and Tobacco Firearm Agents, two Drug Enforcement Administration Agents, five Federal Bureau of Investigation Agents, five Phoenix Police Department Organized Crime and Intelligence Agents--or Detectives, excuse me, two City of Phoenix bomb experts, and two homicide (p. 83) detectives from a midwest location.

In total, Your Honor, I have cooperated in approximately 205 interrogative sessions which have been conducted to date. Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately.

I anticipate testifying in some very serious matters as a nonparticipant in these crimes, no culpability. I anticipate testifying in seven, possibly eight, more murder cases. And plus three additional other matters.

In these four and half years many things have become painfully obvious to me, Your Honor, from my unique position and perspective of both the criminal cases and the various personalities involved.

1. The State of Arizona does not want to reward me for any further cooperation by being just and reasonable.

2. If I am to tender further cooperation to other law enforcement jurisdictions, the State of Arizona will now see to it that I have been punished for giving that cooperation.

3. By removing me from federal custody, realizing full well the danger to my life and that future specific cooperation and consideration involved in the (p. 84) agreement with the Department of Justice, keeping me in federal protective custody, the State of Arizona would have, under normal circumstances, not only frustrated those prosecutions, but would have stopped them. Stopped them just as surely and as effectively as they have the State prosecutions in the Don Bolles homicide.

Accordingly, Your Honor, I have been in contact with Mr. Ron Jennings, United States Attorney's Office. I have told Mr. Jennings that because of the relationship which has now developed with the Attorney General's—Attorney General's Office, State of Arizona, that should another investigative agency wish to investigate and prosecute the Don Bolles homicide, where the State has let the ball lie presently. they will in fact have my cooperation and truthful testimony whenever required, whenever asked, and whenever provided enough immunity to answer the questions.

Now, having set in both places, both hot spots in a murder trial, both as the government's key witness in many cases, and in a murder trial, and as a defendant. Your Honor, it's much harder up here from not only admitting, but from realizing the unimagined pain, suffering and loss my prior acts have caused in concert with the misery, humiliation and personal hell my testimony required me to re-live and experience time and (p. 85) time again while giving evidence and sworn testimony against once—against one's—against those who were once so very, very close to me is a personal punishment far greater than any court

could impose, for indeed there is no immunity from the most enfeebling of all emotions, regret.

I thank Your Honor for allowing me the opportunity to express myself.

(Defendant leaves stand.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN HARVEY ADAMSON,

Petitioner,

vs.

No. CIV 80-502 PHX-CAM

JERRY HILL, Sheriff of Maricopa County, State of Arizona, et al.,

Respondents.

NOTICE OF APPEAL

Petitioner, JOHN HARVEY ADAMSON, by and through his attorneys undersigned, by this Notice hereby appeals from the Court's Order of September 26, 1980 dismissing his Petition for Writ of Habeas Corpus and from the Court's Order of October 21, 1980 denying Petitioner's Motion for Amendment of the Court's Findings, Amendment of the Judgment and vacation of the Order of the Arizona Supreme Court, all in the above-captioned matter.

RESPECTFULLY SUBMITTED this 19th day of November, 1980.

MARTIN & FELDHACKER

/s/ By Gregory H. Martin

/s/ By William H. Feldhacker

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,

Petitioner-Appellant,

vs.

JERRY HILL, Sheriff of Maricopa County, State of Arizona, et al.,

Respondents-Appellees.

No. 80-5941

DC# CV 80-502 M

Arizona (Phoenix)

ORDER

(Filed April 24, 1981)

Before: TANG and SKOPIL, Circuit Judges

The Court has determined that this case is inappropriate for submission on the basis of pre-argument statements under the Appeals Without Briefs Program. Accordingly, the Court issues the following order:

• • •

(c) the parties' briefs shall address, but shall not be limited to, the following issues:

(i) What effect, if any, does the recent decision in *Sumner v. Mata,* 101 S.Ct. 764 (1981), have on federal habeas corpus review of the Arizona Supreme Court's finding that Adamson was required under the plea bargain to testify at the retrial of Dunlap and Robison?

(ii) What effect, if any, do the provisions of 28 U.S.C. § 2254(d) (2), (3), (6), or (8) have on federal habeas corpus review of the Arizona Supreme Court's finding referred to in question (i), *supra*?

(iii) Must the district court hold an evidentiary hearing concerning appellant's duty to testify under the plea bargain in light of appellant's contention that the statements made at his 1978 sentencing regarding a duty to testify at further proceedings related only to the Ashford Plumbing case, rather than the Don Bolles case? (*See* CT 13, Transcript of May 28, 1980 Arizona Supreme Court hearing at 7-8, CT 4, Exhibit 1; and CT 9 at 5-6);

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5941

D.C. No. CV 80-502 PHX-CAM

MEMORANDUM

[Caption omitted]

(Filed Nov. 30, 1981)

Appeal from the United States District Court
for the District of Arizona

Carl A. Muecke, Chief District Judge, Presiding
Argued and Submitted July 13, 1981

Before: ELY and CHOY, Circuit Judges, and PFAELZER,* District Judge.

Appellant Adamson appeals from a district court order dismissing his habeas corpus petition as legally frivolous and from the district court's subsequent denial of his motions to amend the findings and the judgment. We affirm.

I. *The Case*

Adamson was charged with Open Murder in the June 1976 bombing death of Donald Bolles, a charge permitting a verdict of first degree murder. The prosecution struck a plea-bargaining agreement with him providing *inter alia* that Adamson would be allowed to plead guilty to the reduced charge of second degree murder and receive a stipulated sentence. Adamson agreed in return to testify

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*The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

against other individuals under investigation in a number of cases, including his alleged accomplices in the Bolles killing, Max Dunlap and James Robison.

Pursuant to the agreement, Adamson pleaded guilty to second degree murder on January 15, 1977. Adamson cooperated with the prosecution in a number of cases and Robison and Dunlap were convicted of first degree murder in the Bolles case primarily because of his testimony. Although Adamson began to serve time after entering his guilty pleas, he was not formally sentenced until the judgment of guilt was entered on December 7, 1978, nearly two years later.

In early 1980, the convictions of Robison and Dunlap were reversed by the Arizona Supreme Court. The Arizona Attorney General, preparing to reinstitute charges against them, notified Adamson that his testimony would again be required. Adamson, through his counsel, refused to testify unless the state complied with a list of "non-negotiable" demands, including his release from custody. Adamson claimed that his obligations under the plea agreement ended at the time of his formal sentencing. The state warned Adamson of the consequences of continued recalcitrance, and upon his refusal to cooperate charged him with the original count of first degree murder.

The Arizona Superior Court denied Adamson's motions to strike the renewed charge as barred by the existing judgment. Adamson then filed a Petition for Special Action with the Arizona Supreme Court, alleging that the lower court had abused its discretion in refusing to block

the prosecution. The Arizona Supreme Court agreed to hear arguments as to the meaning of the plea agreement despite Adamson's attempt to dismiss the petition when he learned that he could not restrict that court's scope of review.

Following briefing and oral argument, the Arizona Supreme Court concluded that the terms of the plea agreement contemplated a continuing duty on Adamson's part to testify at any retrial made necessary by appellate reversal. The court also ruled that Adamson's breach of his duty to testify constituted a waiver of his right against double jeopardy under the terms of the plea agreement and justified the state's reprosecution.[1] The court vacated Adamson's existing conviction and reinstated the original charge against him.

Adamson then petitioned the federal district court for a writ of habeas corpus, seeking to block the impending state prosecution. He argued that the Arizona Supreme Court had erred in making its double jeopardy ruling and that the state had denied him due process by failing to hold an evidentiary hearing prior to interpreting the plea agreement. After hearing oral argument, the district court dismissed the petition as legally frivolous, agreeing with the Arizona Supreme Court that the provisions of the plea agreement obligated Adamson to testify and that his refusal justified the reprosecution. In an order denying several post-judgment motions by Adamson, the court found that Adamson's counsel had discussed at length the merits of the plea agreement issue before the Arizona Supreme Court and rejected Adamson's request for an evidentiary hearing. Adamson was subsequently tried, convicted of first degree murder and sentenced to death.

II. *Analysis*

Adamson raises two central arguments on appeal from the district court's order: (1) that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the federal district court rested on erroneous interpretations of the plea agreement; (2) that he was denied due process by the failure of the state courts to hold a full evidentiary hearing to determine the material facts surrounding the breach of the plea agreement.

We turn to the procedural argument because its resolution determines the degree of deference due the state court's findings of fact. A federal statute requires that federal courts entertaining habeas corpus petitions treat state court findings of fact with a presumption of correctness so long as the state proceedings meet certain procedural requirements. 28 U.S.C. § 2254(d). Adamson does not dispute that the Arizona Supreme Court proceeding constituted a "hearing on the merits of a factual issue" as required by the statute. *See Sumner v. Mata,* 449 U.S. 539, 546 (1981). He argues instead that the state court hearing was procedurally deficient, thus bringing the factual findings within one of the exceptions enumerated in § 2254(d).[2]

Adamson argues generally that the record on which the Arizona Supreme Court made its decision was inadequate. More specifically, he argues that an evidentiary hearing should have been held to establish "among other things" the context of a colloquy between the sentencing judge and the parties at the time of sentencing.

We disagree that the state proceedings were procedurally inadequate. The Arizona Supreme Court had the

benefit of Adamson's pleadings, oral argument, and a record including *inter alia* the plea agreement, Adamson's written refusal to testify, and a transcript of the proceedings at Adamson's sentencing. Although Adamson objected to the Supreme Court's consideration of the plea agreement, he was given full opportunity to address the issue and his counsel indeed discussed it at oral argument. He specifically identifies only one issue which would be illuminated by the evidentiary hearing he requests, the meaning of a colloguy between his counsel and the sentencing judge, and that issue is essentially collateral to interpretation of the argreement terms.[3] The Supreme Court mentioned the colloquy as evidence rebutting Adamson's interpretation of the plea agreement, but rested its decision upon the provisions of the agreement itself. *See Adamson v. Superior Court,* 125 Ariz. 579, 582-83, 611 P.2d 932, 935-6 (1980). Even if the colloquy were interpreted as Adamson argues it should be, it would cast no doubt on the accuracy of the decision. We find that Adamson was given a full and fair hearing of his claims in state court and that the statutory presumption of correctness attaches to its findings of fact.

Adamson cannot refute that presumption, although he argues that the Arizona Supreme Court erred on the merits in interpreting the plea agreement. The interpretation reached by both the state court and the federal district court, that the plea agreement did not contemplate renegotiation in the event of a retrial, is eminently reasonable.[4] The same can be said for the significance attributed by both courts to the deferred sentencing provision.[5] The thrust of that provision concerns a waiver of prompt sentencing rights and not a time for termination

of the plea agreement. This interpretation is buttressed by terms of the agreement obligating Adamson to refrain from appealing the conviction or from applying for parole, obligations which were clearly intended to extend beyond the time of sentencing.

In anticipation that this appeal would fail, Adamson suggests that this court allow him to "cure" his breach of the plea agreement by returning him to the status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

AFFIRMED.

FOOTNOTES

1. [reference on page 3]

   Paragraph 5 of the plea agreement provides in part that:

   Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated. The defendant will be subject to the charge of Open Murder and if found guilty of First Degree Murder to the penalty of death or life imprisonment requiring mandatory twenty-five (25) years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

2. [reference on page 4]

Adamson specifically alleges that the state proceedings were defective under 28 U.S.C. § 2254(a)(2), (3), (6) and (8), which provide exceptions to the presumption of correctness where it is established.

> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . .
>
> (6) that the appliance did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> . . .
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: . . . .

3. [reference on page 5]

In the colloquy, Adamson's counsel acquiesced in the prosecutor's statement for the record that the opposing counsel had discussed the fact "that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony." Adamson argues that the discussion related only to testimony in a case unrelated to the Bolles case and did not extend to testimony at a retrial.

4. [reference on page 5]

Paragraphs 4 and 5 of the plea agreement provide, in pertinent part, that:

> 4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. . . .
>
> 5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement.
>
> This shall include all interviews, depositions, hearings and trials. . . .

In interpreting those provisions, the Arizona Supreme Court held:

> Although the plea agreement does not specifically spell out the duration of petitioner's obligations, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

Adamson v. Superior Court, 125 Ariz. 574, 583; 611 P.2d 932, 936 (1980).

5. [reference on page 5]

Paragraph 8 of the plea agreement provides:

> 8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.

Adamson contends that this provision should be interpreted as indicating that the act of sentencing concluded his obligation to testify.

IN THE UNITED STATES DIISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AMENDED SUPPLEMENTAL PETITION
FOR WRIT OF HABEAS CORPUS AND
MEMORANDUM IN SUPPORT

[*Ricketts* habeas]

[Caption Omitted]

(Filed December 14, 1983)

The Petitioner, JOHN HARVEY ADAMSON, by and through his atorney undersigned, submits the following Supplemental Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and for said Supplemental Petition alleges as follows.

I

This Petition is filed pursuant to 28 U.S.C. § 2254, et seq.

II

On June 13, 1976, Petitioner was arrested for the murder of Don Bolles, alleged to have occurred on June 2. 1976. in Phoenix, Arizona.

• • •

IX

• • •

H. Petitioner' s sentence of death was imposed arbitrarily and capriciously, in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments. solely because of his initial attempt to obtain additional consideration for testimony at the retrial of his alleged co-conspirators, and despite the fact that the same sentencing judge had agreed to impose and imposed a term of imprisonment for the same crime upon his guilty plea.

1. Petitioner initially entered into a plea agreement with the State of Arizona whereby he was permitted to plead guilty and receive a sentence of 48 to 49 years for

this murder, in exchange for his testimony in the prosecution of others allegedly involved in the crime.

2. The trial court agreed to the terms of this agreement prior to Petitioner's guilty plea, and imposed a term of imprisonment upon that plea, after Petitioner testified at those trials, which resulted in convictions of others.

3. The convictions of Petitioner's alleged co-conspirators were reversed by the Arizona Supreme Court. Following that reversal, Petitioner initially attempted to obtain additional consideration for his testimony at any retrial, which he believed was not contemplated by the initial plea agreement. The prosecution refused Petitioner's offer and filed new charges of first degree murder. The Arizona Supreme Court, without conducting an evidentiary hearing, held the plea agreement was breached and permitted the reinstatement of the charge.

4. Prior to his retrial. Petitioner renewed his offer to testify at the co-conspirator's retrial, under the terms of the original plea agreement. The prosecution declined his offer, and the case proceeded to trial. During the trial, and up to the time of sentencing, Petitioner maintained his offer to testify consistent with the original agreement, but the prosecution declined. Petitioner also voluntarily testified in other, related cases, not covered by the plea agreement after his sentence to death.

5. Petitioner was sentenced to death by the same trial judge who had previously sentenced him to imprisonment under the plea agreement. The trial judge had approved the agreement. and was aware of the testimony Petitioner gave in consideration of that agreement, which was never admitted into the record of this case.

6. The Prosecution in this case sought Petitioner's death sentence for reasons other than the strength of the evidence against him and the seriousness of his crime. The trial court imposed the increased sentence without finding that Petitioner had engaged in any subsequent acts of misconduct after the first sentencing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MOTION FOR APPOINTMENT OF
ADDITIONAL COUNSEL FOR PETITIONER

[*Ricketts* habeas]

[Caption Omitted]

(Filed December 8, 1983)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undersigned hereby moves this court for an order that additional counsel be appointed to assist counsel undersigned for the following reasons.

Counsel undersigned is now a sole practioner [sic] devoting his time exclusively to the defense of criminal defendants. Counsel has a contract with Maricopa County to provide representation to indigents charged with crimes in the County Justice and Superior Courts. Because of this, counsel's caseload is extensive, and in order to afford Petitioner the representation needed and to which he is entitled, additional counsel is needed.

Additionally. Petitioner has included in his petition the allegation that he was sentenced arbitrarily and capriciously to death after having been first sentenced to imprisonment on a reduced charge in exchange for his cooperation. After Petitioner's plea agreement was declared null and void and the original charge of murder was reinstated, Petitioner agreed to testify in this matter as well as others in exchange for his plea agreement. At sentence, Petitioner voiced this intention again and has, in fact, since the imposition of death cooperated with law enforcement in the investigation and prosecution of individuals involved in serious criminal activity. Counsel

undersigned as well as William Schafer are material witnesses in connection with this allegation. Petitioner has requested an evidentiary hearing on this claim and if granted additional counsel will be needed to present Petitioner's position.

For the reasons stated herein, Petitioner respectfully requests that additional counsel be appointed for him in the above-captioned matter.

DATED this 7th day of December, 1983.

MARTIN & FELDHACKER

/s/ Gregory H. Martin

IN THE UNITED STATES DISRICT COURT
FOR THE DISTRICT OF ARIZONA

PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

[*Ricketts* habeas]

[Caption omitted]

(Filed December 29, 1983)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undersigned, hereby moves this Court for an evidentiary hearing on claims IX-H and IX-I pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts and 28 U.S.C. § 2254(d).

DATED this 29th day of December, 1983.

MARTIN & FELDHACKER

By: Gregory H. Martin

MEMORANDUM

Petitioner, in claim IX-H has raised the argument that his death sentence was imposed arbitrarily and capriciously, in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments, because of his initial attempt to obtain additional consideration for testimony at the retrial of his alleged con-conspirators, and despite the fact that the same sentencing judge had agreed to impose and did impose a term of imprisonment for the same conduct upon his guilty plea.

Petitioner submits that evidence must be taken in connection with the events that transpired after Petitioner's plea agreement was declared null and void by

the Arizona Supreme Court on May 28, 1980, and after this Court upheld the Arizona Supreme Court's ruling on September 26, 1980, in *Adamson v. Hill,* No. CIV 80-502-PHX-CAM. Petitioner has heretofore requested that this Court consider the file in No. CIV 80-502-PHX-CAM when disposing of this issue. However, additional evidence must be adduced regarding the negotiations by the parties after May 28, but before September 26. 1980, and, then, after September 26, through the time when Petitioner was sentenced to death. As has been set forth, evidence will show that the State of Arizona wished to obtain the testimony of the Petitioner in exchange for a reduced charge. Petitioner argues that his ultimate death sentence in light of the State's willingness to bargain for his life constitutes an arbitrary and capricious application of the death penalty and therefore is unconstitutional.

Further, because counsel undersigned is a potential witness with respect to the claim the Court should grant his previously filed motion for appointment of counsel.

Petitioner, in claim IX-I, has raised the argument that his death sentence was unconstitutionally imposed and upheld by virtue of the fact that the Arizona Supreme Court, when it conducted its proportionality review, did not consider cases wherein a life sentence was imposed. The court only compared the instant case to other cases where the death sentence was imposed and did not review, what Petitioner views as equally important, those cases where life was the sentence as opposed to death. Petitioner requests that this Court set a time and date for an evidentiary hearing in order that Petitioner may

adduce evidence at such hearing in connection with those cases where a life sentence was imposed, thereby showing the disproportionality of the sentence given here compared to all murder cases, and therefore its unconstitutionality.

Ever since the Federal Habeas Corpus Act of 1867 was passed, the federal courts have had the power and the responsibility in habeas corpus proceedings to "hear and determine the facts, dispose of the matter as law and justice require." Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86. See *Townsend v. Sain,* 372 U.S. 293, 311 (1962). This authority and responsibility are currently codified in 28 U.S.C. § § 2243 and 2254(d), as well as in Rule 8 of the Rules Governing § 2254 Cases.

Moreover, the Supreme Court has continually and frequently held that the federal judiciary is required to make an independent determination of any factual dispute material to a federal issue appropriately raised in a federal habeas corpus petition — and that such a determination requires an evidentiary hearing in most cases in which the facts are in dispute. E.g., *Jackson v. Virginia,* 443 U.S. 307, 318 (1979); *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977); *Townsend v. Sain,* 372 U.S. 293, 312 (1963); *Brown v. Allen,* 344 U.S. 443, 462 (1953). Cf. *Blackledge v. Allison,* 431 U.S. 63 (1977); *Machbroda* [sic] *v. United States,* 368 U.S. 487, 495 (1962); *Pennsylvania ex.rel. Herman v. Claudy,* 350 U.S. 116, 120-21 (1956). As the Court held in *Townsend v. Sain,* supra, "where an applicant for a writ of Habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew", for "the opportunity for redress, which

presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed". *Townsend* citing *Frank v. Mangum,* 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting).

The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". *Woodson v. North Carilina* [sic], 428 U.S. 280, 305, 1976. This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, sentence, and appeal:

> "the defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence of death even if he may have no right to object to a particular result of the sentencing process". *Gardner v Florida,* 430 U.S. 349, 358 (1977).

See *Beck v. Alabama,* 447 U.S. 625, 637-38 (1980); and *Eddings v. Oklahoma,* 102 S.Ct. 869, 877 (1982) (O'Connor, J., concurring); and *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, *Gregg v. Georgia,* 428 U.S. 153, 187 (1976 , including full and fair state and federal post-conviction proceedings. E.g., *Shaw v. Martin,* 613 F.2d. 487, 491 (4th Cir., 1980) (Phillips, single Circuit J.), relying on *Evans v. Bennett,* 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

Because evidentiary hearings in federal habeas corpus proceedings, as well as in other situations, have consistently been recognized as important means of assuring the

reliability of judicial determinations, *Woodson v. North Carolina,* supra, and its progeny make it particularly important in capital cases, such as the present one, that an evidentiary hearing be held whenever it may shed any light on the fairness of the procedures leading to, or the constitutional validity of, a sentence of death. In short, if the possibility of "detention [that] violates the fundamental liberties of the person", typically requires federal habeas corpus hearing, *Townsend v. Sain,* supra, at 312, the possibility of execution under such circumstances should provide all the more reason for holding such a hearing. For "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two". *Woodson v. North Carolina,* supra, at 305.

For the reasons stated herein, it is respectfully requested that the Court provide a time and date for an evidentiary hearing on those matters discussed herein.

DATED this 29th day of December, 1983.

MARTIN & FELDHACKER

/s/ by Gregory H. Martin

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,
Petitioner-Appellant,

No. 84-2069

v.

JAMES G. RICKETTS, et. al.,
Respondent-Appellee.

ORDER
(Filed July 12, 1985)

Before: KENNEDY, HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, and BRUNETTI, Circuit Judges.

Oral argument in the above case shall be held in San Francisco on Tuesday, September 17, 1985 at 10:00 a.m.

The parties shall submit supplemental briefs of no more than thirty pages including a discussion of the following issues:

(1) Whether the double jeopardy clause barred Adamson's conviction and sentence of death following his conviction and sentence pursuant to the plea agreement;

(2) Whether the application of the death penalty to Adamson was arbitrary on the grounds that the State sought it and the sentencing judge imposed it vindictively.

Appellant's brief is due August 2, 1985; the appellee's brief is due August 23, 1985. The parties shall also file 18 additional copies of their original briefs and excerpts of record by August 23, 1985.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EN BANC

No. 84-2069

JOHN HARVEY ADAMSON,
Petitioner/Appellant,

v.

JAMES G. RICKETTS, et al.,
Respondent/Appellee.

PETITIONER'S MOTION TO
AUGMENT THE RECORD

Pursuant to Federal Rules of Appellate Procedure Rule 27(b) and Rule 10(e), Petitioner John Harvey Adamson moves this Court to augment the record in this case with the following documents: The District Court Record in the proceeding *John Harvey Adamson v. Jerry Hill, et al.*, Ninth Circuit Court of Appeals No. 80-5941; United States District Court for the District of Arizona No. CV 80-502.

By its Order of July 12, 1985, the Court has required the parties to further brief the issues in this case, including

> whether the double jeopardy clause barred Adamson's conviction and sentence of death following his conviction and sentence pursuant to the plea agreement.

Some of the record documents relevant to this issue are contained in the record of *Adamson v. Hill,* where the same question was raised.

The same District Court Judge who ruled on the Petition in this case presided at the earlier habeas corpus

proceeding in *Adamson v. Hill.* Petitioner's arguments in this case referred the District Court to the documents in the *Adamson v. Hill* record. *See* Petitioner's Supplemental Brief on Rehearing *En Banc* at 6 n.3, 14 n.8. So that this Court will have the same documentation before it in deciding this issue *en banc,* Petitioner believes that the record here should be augmented with the *Adamson v. Hill* record from the District Court.

Respondent's counsel has indicated that he has no objection to augmentation of the record with these documents. *See* Affidavit of Timothy K. Ford attached hereto. Such augmentation would prejudice neither party and would facilitate a full review of all issues in this case by the Court *en banc.* Petitioner has included with this Motion a certified copy of the entire *Adamson v. Hill* Clerk's Record, to facilitate the process of augmentation, if the Court allows it.

DATED this 19th day of August, 1985.

Respectfully submitted,

/s/ Timothy K. Ford
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,
Petitioner-Appellant,

vs.

JAMES G. RICKETTS, Director, Arizona Department of Corrections; and
DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,
Respondents-Appellees.

ORDER

(Filed August 30, 1985)

Before: KENNEDY, HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, and BRUNETTI, Circuit Judges.

Petitioner's motion to augment the record is GRANTED.

John Harvey ADAMSON,

Petitioner-Appellant,

v.

James G. RICKETTS, Director, Arizona Department of Corrections, et al.,

Respondents-Appellees.

No. 84-2069.

United States Court of Appeals, Ninth Circuit.

Argued En Banc and Submitted

Sept. 17, 1985

Decided May 9, 1986.

* * *

Before KENNEDY, HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, and BRUNETTI, Circuit Judges.

FERGUSON, Circuit Judge:

Petitioner filed a petition for a writ of habeas corpus in the District Court of Arizona after exhausting all his state remedies. He contends that his conviction for first degree murder and death sentence violated various provisions of the federal Constitution. The district court denied his petition, and a panel of this court affirmed that denial, *Adamson v. Ricketts,* 758 F.2d 441 (9th Cir. 1985). That decision was vacated when the majority of the judges of the circuit voted to have the appeal determined by an en banc panel. We reverse the district court and direct the issuance of a writ of habeas corpus.

I.

Petitioner Adamson was arrested and charged with the 1976 car bombing murder of Don Bolles, an investigative reporter in Arizona. In January 1977 Adamson and the state entered into a plea agreement[1] under which Adamson would testify against two other individuals and plead guilty to second degree murder. In exchange, Adamson would receive a sentence of 48-49 years imprisonment, with actual incarceration time to be 20 years, 2 months.

On January 15, 1977, Superior Court Judge Ben Birdsall reviewed the plea agreement, but conditioned his acceptance of its provisions until he determined the appropriateness of the sentence. Four days later, Judge Birdsall found the sentence appropriate and accepted the guilty plea and plea agreement provisions.

After the court's acceptance of the plea agreement, for the next three years Adamson cooperated with authorities. On the basis of Adamson's testimony, Max Dunlap and James Robison were convicted of the first degree murder of Bolles. While the Dunlap and Robison convictions were pending on appeal, the state moved to have Adamson's sentence imposed. Judge Birdsall sentenced Adamson to the agreed term of 48-49 years on December 7, 1978.

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison and remanded the cases for new trials. *State v. Dunlap,* 125 Ariz. 104, 608 P.2d 41 (1980); *State v. Robison,* 125 Ariz. 107, 608 P.2d 44 (1980). When the state sought to secure Adamson's testimony in the retrials, Adamson's lawyer

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1. The text of the plea agreement appears in Appendix A.

stated that his client believed that the plea agreement terminated his obligations once he was sentenced. He further stated that Adamson requested additional consideration, including release, in exchange for his testimony at the retrials.[2] The state, in a letter to Adamson's attorneys dated April 9, 1980, stated that it considered Adamson to have breached the plea agreement by refusing to testify and that Adamson would be prosecuted for first degree murder.[3]

A few days later, the state called Adamson as a witness at a pretrial hearing in the Dunlap and Robison retrials. Adamson re-confirmed his previous testimony concerning the Bolles killing but asserted a Fifth Amendment privilege when questioned about another crime. After examining the state's letter of April 9, 1980, Superior Court Judge Robert L. Myers denied the state's motion to compel Adamson to testify. Judge Myers concluded that Adamson could legitimately assert his Fifth Amendment rights unless the state granted him immunity from prosecution. Although the state sought review of Judge Myers' denial of the motion to compel Adamson to testify, the Arizona Supreme Court

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2. The letter sent by Adamson's attorney included the following terms for Adamson's future testimony: (1) release from custody after testifying; (2) to be held in a non-jail facility with full-time protection during the retrials; (3) a complete set of clothing; (4) protection for his ex-wife and son; (5) an educational fund for his son; (6) transportation and funds for establishing a new identity outside of Arizona; and (7) full and complete immunity for all crimes in which he may have been involved, stipulating that none were murders. The full text of the letter is contained in Appendix B.

3. The text of the state's letter is contained in Appendix C.

declined to accept jurisdiction of the Special Action Petition. *Adamson v. Superior Court*, 125 Ariz. 579, 582, 611 P.2d 932, 935 (1980) (en banc).

The state filed a new information charging Adamson with first degree murder, *id.*, which he challenged by a Special Action in the Arizona Supreme Court, *id.* at 579, 611 P.2d at 933. The court held that Adamson, by refusing to testify, breached the plea agreement and that he waived the defense of double jeopardy. *Id.* at 584, 611 P.2d at 937. The court vacated Adamson's second degree murder sentence, judgment of conviction, and guilty plea, and reinstated the open murder charge. Following that decision, Adamson offered to accept the state's interpretation of the agreement and to testify against Dunlap and Robison. The state refused Adamson's offer and proceeded with the charge of first degree murder.

Adamson unsuccessfully sought federal habeas corpus review pursuant to 28 U.S.C. § 2254, and this court affirmed in an unpublished memorandum disposition the district court's denial of the petition. *Adamson v. Hill,* 667 F.2d 1030 (9th Cir.1981). On October 17, 1980, Adamson was convicted of first degree murder. At sentencing, in accordance with the Arizona statute, Ariz.Rev.Stat.Ann. § 13-703(C), Judge Birdsall concluded that two aggravating circumstances—(1) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, and (2) the defendant committed the offense in an especially heinous, cruel or depraved manner—were present to invoke a death sentence. The Arizona Supreme Court affirmed. *State v. Adamson,* 136 Ariz. 250, 665 P.2d 972, *cert. denied,* 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983). The petitioner then instituted the present federal habeas corpus proceeding.

The issues before this court are (1) whether the admission of certain evidence at trial violated the Confrontation Clause; (2) whether the Arizona statute denied the petitioner's right to a jury trial by permitting judicial factfinding to determine eligibility for a death sentence; (3) whether the Arizona statute's aggravating factor of heinous, cruel or depraved manner is unconstitutionally vague; (4) whether the imposition of a death sentence following Adamson's assertion of his Fifth Amendment rights constitutes prosecutorial or judicial vindictiveness;[4] (5) whether the Arizona statute violate the Eighth Amendment by requiring a death sentence if aggravating circumstances are present; and (6) whether prosecution for first degree murder after Adamson's guilty plea and conviction for second degree murder violated the prohibition against double jeopardy. Because the state's actions violated the Double Jeopardy Clause, we do not discuss or decide the validity of the remaining issues.

II.

The Double Jeopardy Clause, which applies to state proceedings, *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause incorporates three separate guarantees: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same of-

4. The dissenting opinion contends that in this case there was no prosecutorial or judicial vindictiveness. As we have declined to address the validity of that issue, we express no opinion about the position taken by the dissent.

fense after conviction, and against multiple punishments for the same offense." *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 306-07, 104 S.Ct. 1805, 1812-13, 80 L.Ed.2d 311 (1984) (citing *Illinois v. Vitale,* 447 U.S. 410, 415, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 228 (1980)); *see United States v. Brooklier,* 637 F.2d 620, 621 (9th Cir.), *cert. denied,* 450 U.S. 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1980).

Implicit in the prohibition against prosecution for the same offense following conviction is the "constitutional policy of finality for the defendant's benefit." *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion); see also *United States v. Scott,* 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978) ("primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"). Without this respect for finality, prosecutors, equipped with substantially greater resources than most individuals, would be permitted and encouraged to reprosecute defendants when the result was any sentence short of the maximum penalty. *See United States v. Dinitz,* 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976) ("Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' ") (quoting *Green v. United States,* 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957)).

For a defendant to invoke the double jeopardy bar against a subsequent prosecution, jeopardy must have attached to the first prosecution. When the defendant forgoes the right to have guilt determined by the trier of fact and instead pleads guilty to the charged offense, under some circumstances jeopardy attaches when the judge accepts the plea. *See, e.g., United States v. Vaughan,* 715 F.2d 1373, 1378 n.2 (9th Cir.1983); *United States v. Bullock,* 57 F.2d 1116, 1118 (8th Cir.), *cert. denied,* 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978).

Here it appears that the plea was accepted subject to certain conditions. We need not decide whether jeopardy attached upon such an acceptance, *see United States v. Cruz,* 709 F.2d 111, 114-15 (1st Cir.1983) because, in any event, jeopardy attached to the prosecution for second degree murder when Judge Birdsall entered a judgment of conviction and sentenced Adamson on December 7, 1978.

Double jeopardy prohibits multiple prosecutions for the same offense. As a general rule, a conviction for a lesser-included offense bars the subsequent prosecution for the greater offense. *Illinois v. Vitale,* 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2266-68, 65 L.Ed.2d 228 (1980); *United States v. Stearns,* 707 F.2d 391, 393 (9th Cir.1983), *cert. denied,* 464 U.S. 1047, 104 S.Ct. 720, 79 L.Ed.2d 181 (1984). The Supreme Court in *Brown v. Ohio,* 432 U.S. 161, 168, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977), determined that a conviction for joyriding barred the subsequent prosecution for the greater offense of auto theft because the "greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *See also Garrett v. United States,*

— U.S. —, 105 S.Ct. 2407, 2416, 85 L.Ed.2d 764 (1985) (*Brown* defendant "engaged in a single course of conduct"). To analyze this issue we must determine whether each offense "requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932); *see also Vitale,* 447 U.S. at 416-17, 100 S.Ct. at 2265-66.

The state argues that Adamson was not subject to double jeopardy because his first conviction was for second degree murder and his second conviction was for first degree murder. If accepted, this reasoning would vitiate any protection guaranteed by the Double Jeopardy Clause. As with *Brown,* Adamson's second degree murder conviction was a lesser-included offense of first degree murder. A conviction for second degree murder requires no fact that is not also needed to sustain a first degree murder conviction. Furthermore, the State of Arizona even recognizes this relationship by classifying the two types of murder as different degrees of the same crime. *See* Ariz. Rev.Stat.Ann. § 13-452, *repealed by* Laws 1977, ch. 142, § 15, effective October 1, 1978. Thus, Adamson's double jeopardy rights were violated by the subsequent prosecution for first degree murder.

III.

The Arizona Supreme Court agreed that jeopardy attached to the second degree murder prosecution, *Adamson v. Superior Court,* 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980), but it vacated Adamson's conviction and sentence because it believed that he had waived his double jeopardy rights by the plea agreement. We need not resolve whether a defendant may waive double jeopardy rights in the

same manner as other constitutional rights because we conclude that, even if double jeopardy protection is waivable, it was not waived in this case.

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamentotal rights.' " *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (quoting *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed. 1177 (1937), and *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 307, 57 S.Ct. 724, 731-32, 81 L.Ed. 1093 (1937)). Before finding that a defendant has waived a right, a court must be convinced that there was "'an intentional relinquishment or abandonment of a known right or privilege.'" *United States v. Anderson,* 514 F.2d 583, 586 (7th Cir.1975) (quoting *Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023). In situations involving other constitutional rights, we have required a finding that the defendant's waiver was "made voluntarily, knowingly and intelligently." *United States v. Cochran,* 770 F.2d 850, 851 (9th Cir.1985) (waiver of right to jury trial). Furthermore, given the importance of the right, such waiver must be made expressly, rather than implied by conduct. *Cf. Menna v. New York,* 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed. 2d 195 (1975) (per curiam) (will not imply waiver of double jeopardy rights from guilty plea in second prosecution); *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978).

The state maintains that Adamson waived the double jeopardy protection when he signed the agreement. It urges this court to adopt the Arizona Supreme Court's conclusion that the plea agreement "by its very terms

waives double jeopardy if . . . [it] is violated." *Adamson v. Superior Court of Arizona,* 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980).[5] To support this conclusion, the state argues that Adamson impliedly waived his double jeopardy

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5. The Arizona Supreme Court relied on the text of the agreement and a statement by Adamson's attorney at the time of sentencing in which Adamson's attorney acknowledged that his client understood that he might have to testify at a future proceeding. The dissent likewise relies on the attorney's statement as evidence that Adamson knew that his obligations continued after sentencing.

The uncontroverted explanation of this "understanding" is that it involved a wholly separate prosecution. Simply because Adamson might have modified his obligations under the plea agreement to include testifying in the *Ashford Plumbing Co.* trial after his sentencing, this modification cannot be used as "evidence" that he knew he had to testify further against Dunlap and Robison. Moreover, even if the reference were to the possible Dunlap and Robison retrials, an attorney's actions cannot constitute a waiver of his or her client's protection against double jeopardy. *See United States v. Rich,* 589 F.2d 1025, 1032 (10th Cir.1978) ("Inasmuch as this right is anchored to the United States Constitution, it cannot be waived by one other then [sic] the accused.").

The Arizona Supreme Court's finding of a waiver does not preclude this court's own inquiry into that issue. Whether Adamson's actions constituted a waiver of a constitutional right is determined by federal law. *Gladden v. Unsworth,* 396 F.2d 373, 376 (9th Cir.1968). In a habeas review a federal court must presume the correctness of a state appellate court's finding of fact unless one of the seven circumstances provided for in 28 U.S.C. § 2254(d) is present or if the state court finding of fact is not fairly supported by the record and the federal court provides a written explanation for its conclusion. *Sumner v. Mata,* 455 U.S. 591, 592-93, 102 S.Ct. 1303, 1304-05, 71 L.Ed.2d 480 (1982) (per curiam).

Section 2254(d), however, applies only to questions of "'basic, primary, or historical fac[t].'" *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80

(Continued on following page)

claim by accepting paragraphs five and fifteen of the plea agreement. Paragraph five outlines Adamson's obligation to testify and provides that if he refused, "this entire agreement is null and void and the original charges will be automatically reinstated." Paragraph fifteen provides that if "this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement."

The state's contention that these paragraphs constitute a knowing waiver of double jeopardy is without merit. It may well be argued that the only manner in which Adamson could have made an intentional relinquishment of a known double jeopardy right would be by waiver "spread on the record" of the court after an adequate explanation. *See Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1968). Even if we were to permit a waiver by implication, the more reasonable interpretation of the

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(Continued from previous page)

L.Ed.2d 674 (1984) (quoting *Townsend v. Sain,* 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963)). When the issue includes a mixed question of law and fact or questions of law, setcion 2254(d) does not require giving a presumption of correctness to the state court's findings. *See Fendler v. Goldsmith,* 728 F.2d 1181, 1190 n. 21 (9th Cir. 1984).

This case presents a mixed question of law and facts. Section 2254(d) applies to "historical" facts, such as whether Adamson signed the agreement, but it does not apply to whether his actions constituted waiver of double jeopardy. *See Sumner v. Mata,* 455 U.S. at 597, 102 S.Ct. at 1306-07 (questions of fact governed by section 2254(d), but reviewing court may accord "different weight to the facts"); *Fendler v. Goldsmith,* 728 F.2d at 1190 n. 21. *Cf. Miller v. Fenton,* — U.S. —, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("voluntariness of a confession is a matter for independent federal determination").

agreement is that double jeopardy was not waived. The agreement contains several express waivers of constitutional rights, including the right to a jury trial, to confront and cross-examine witnesses against him, to present a defense, to have appointed counsel, to remain silent, and to be presumed innocent until proved guilty beyond a reasonable doubt. Although each of these waivers is specified in the agreement, double jeopardy is not mentioned. Furthermore, when reviewing the plea agreement, Judge Birdsall questioned Adamson at length about his waiver of the constitutional rights enumerated in the document, but did not inquire about any waiver of double jeopardy claims.

The plea agreement provides in paragraph five that "should the defendant refuse to testify . . . then this entire agreement is null and void and the original charges will be automatically reinstated." Nothing in the agreement specifies that Adamson waived any defenses he had to those charges, including the constitutional defense of double jeopardy. Agreeing that charges may be reinstituted under certain circumstances is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived. No evidence has been presented that suggests Adamson knew he was waiving his double jeopardy defense to the reinstituted charge. The plain language of the plea agreement merely provided that under certain circumstances the charges could be reinstituted.

Even if we assume, as the state contends, that the plea agreement contained an implied waiver of double jeopardy rights, the most that could be found implied in the plea agreement is that if Adamson did, or refused to do, something in the future, his action or inaction would constitute a waiver of his double jeopardy rights. But to meet the test

of a knowing, intentional waiver there would have to be an action or inaction that Adamson knew would constitute a waiver. Simple contractual principles are ill-suited to determine whether there has been a waiver of a vital constitutional right. The state argues, in effect, that Adamson entered into a contract, and that implied in that contract was a provision that if it was ultimately determined that Adamson breached the contract, even though he did so unknowingly, the effect of the breach would be to waive his double jeopardy rights. Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has knowingly and intentionally waived a constitutional right.

To constitute a knowing and intentional waiver of double jeopardy rights based on the breach of a plea agreement, the defendant's action constituting the breach must be taken with the knowledge that in so doing we waives his double jeopardy rights. Adamson's obligation to testify under the terms of the plea agreement was not clear and was reasonably subject to the interpretation that he and his attorney advanced. When there was a reasonable dispute as to Adamson's obligation to testify, there could be no knowing or intentional waiver until his obligation to testify was announced by the court. In this case, the superior court had upheld his refusal to testify and it was not until the Arizona Supreme Court ruling in *Adamson v. Superior Court*, 125 Ariz. 579, 611 P.2d 932 (1980), that it was judically determined that he was obligated under the plea agreement to testify. Immediately thereafter, Adamson agreed to do so.

Adamson reasonably believed that a refusal to testify did not constitute a breach of the agreement. The only unambiguous language in the agreement referring to when his obligation to testify terminated appears in paragraph eight. That paragraph provides that sentencing would occur "at the conclusion of his testimony in all of the cases." Logic and common sense support Adamson's position that when the state moved for sentencing, it acknowledged that his obligation to provide further testimony ended. The other provisions of the agreement support this interpretation. The state explicitly provided for two obligations that would continue past sentencing—Adamson's waiver of early parole and his waiver of an appeal. The obligation to testify could quite reasonably be interpreted to terminate at the time of sentencing.

Even if Adamson was obligated to testify after sentencing, it was reasonable for him to believe that his assertion of his Fifth Amendment rights at the Robison and Dunlap pretrial hearings did not violate the agreement. At oral argument, the state admitted that Adamson's attorney's letter listing the additional demands in exchange for his testimony was not a breach of the agreement. Rather, it was Adamson's assertion of his interpretation of the agreement. Adamson's refusal to testify at the Dunlap and Robison pretrial hearings was in direct response to the state's letter purporting to withdraw the protection of the plea agreement. It was reasonable for him to believe that the state's position vitiated his obligation to testify. Furthermore, Judge Myers upheld the validity of his Fifth Amendment assertion, and the Arizona Supreme Court refused to hear the state's appeal.

We fail to see how advancing one's interpretation of a plea agreement without more constitutes a knowing and voluntary waiver of double jeopardy. A defendant has the right to assert a reasonable construction of an agreement that differs from the state's interpretation. Otherwise, prosecutors would force defendants into accepting their interpretation. Adamson's position is a reasonable reading of the agreement. The defendant, faced with the state's letter asserting that he was no longer protected from prosecution, could hardly be expected to forgo the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision.

Although the Arizona Supreme Court may have correctly decided under state law that Adamson breached the agreement, its vacation of the conviction and sentence did not remove the jeopardy that attached at Adamson's prior sentencing. The court relied on paragraph five's provision that Adamson's failure to testify would nullify the agreement. By its express provisions, this clause could only result in voiding the executory agreement; it has no effect on the judgment of conviction and sentence.

The state argues that this literal interpretation of the plea agreement would make the bargain illusory. Such a claim ignores available options to ensure performance. Competent drafting of the agreement was certainly a method available to the state. The agreement could have addressed the waiver issue, specifically, whether a double jeopardy defense to a reinstated charge of first degree murder would be waived and what actions of Adamson would bring about the waiver. Even absent sufficient foresight and adequate drafting, the state would have avoided the

entire problem by waiting until the Dunlap and Robison prosecutions were completed before having Adamson sentenced. The state offered no reason why Adamson had to be sentenced in December 1978. In fact, there was none. Both parties had waived the time for sentencing in paragraph eight. Finally, the state could have called Adamson to testify after he agreed to do so. The state claims this last option was inadequate because Adamson's credibility was diminished after his attorney submitted the list of additional requests. We are unpersuaded that a confessed murderer who has agreed to testify in return for a lesser punishment would have less credibility because his attorney made additional demands which were rejected by the state.

We conclude that jeopardy attached to the conviction for second degree murder and that Adamson did not knowingly and intelligently waive his double jeopardy protections.[6]

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6. The dissent places great reliance on *Jeffers v. United States*, 432 U.S. 137, 153, 97 S.Ct. 2207, 2217-18, 53 L.Ed.2d 168 (1977), to dispose of Adamson's double jeopardy claims. At 729. Such reliance is misplaced. The Supreme Court in *Jeffers* held that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." 432 U.S. at 152, 97 S.Ct. at 2217.

Adamson, unlike Jeffers, never elected to have two offenses set forth in two separate indictments tried separately, nor did he persuade the trial court to honor his election, nor were there in fact two indictments and two trials. The *Jeffers* exception to *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is inapplicable to the facts of this case.

IV.

The district court is directed to issue a writ of habeas corpus freeing the petitioner from the sentence and servitude of his conviction of first degree murder and the imposition of the death sentence.

The granting of the writ will not impair in any degree the conviction and sentence of the petitioner for the second degree murder based upon his plea agreement. The petitioner does not assert any invalidity in that sentence, and indeed he cannot as his claim of double jeopardy is based upon the fact that the second degree murder conviction is valid and enforceable. *See State v. Shaw,* 646 S.W.2d 52 (Mo.1983) (validity of first conviction unaffected by prohibiting second prosecution); *cf. Morris v. Mathews,* — U.S. —, 106 S.Ct. 1032, 1038-39, 89 L.Ed.2d 187 (1986) (appellate court permitted to reduce jeopardy-barred conviction to lesser-included offense that is not jeopardy-barred). Without such a valid conviction, there could be nothing upon which double jeopardy attaches.

The judgment of the district court denying the petition for writ of habeas corpus is reversed. The district court is directed to issue a writ of habeas corpus that frees the petitioner from the death penalty. The writ shall further provide for release of the defendant from all restraint caused by his conviction of first degree murder unless the Arizona Supreme Court, on or before six months from the date of the mandate in this appeal, reinstates the conviction for second degree murder that it previously vacated. *See Morris v. Mathews,* 106 S.Ct. at 1038-39.

REVERSED AND REMANDED.

APPENDIX A

Terms of Plea Agreement

1. The defendant, John Harvey Adamson, hereby agrees to plea guilty to Murder, Second Degree.

2. The statutory range of sentence for Murder, Second Degree, is probation if no sentence is imposed and ten (10) years to life if sentence is imposed.

3. The parties agree that the defendant shall receive a sentence of forty-eight (48) to forty-nine (49) years to date from June 13, 1976. The parties agree that the defendant shall be incarcerated for a total of twenty (20) calendar years and two (2) calendar months and that the sentence (48-49 years) when computed with statutory credits will not permit the defendant to complete the service of the maximum sentence of forty-nine (49) years until twenty (20) calendar years and two (2) calendar months have been passed. It is also agreed that the defendant will be incarcerated for no longer than twenty (20) years and two (2) months. Further the parties agree that the defendant will not apply for or be eligible for parole until twenty (20) calendar years and two (2) calendar months have passed. If the defendant applies for parole, the defendant agrees that this agreement is null and void and the original charges are reinstated automatically. The parties also agree that if for any reason the statutory time credits the defendant earns while incarcerated are taken away from him through no fault of his, including time spent in protective custody, whether requested by the defendant or ordered by the authorities, the sentencing Court will recompute the length of the sentence so that the defendant will not be incarcerated for any period

longer than twenty (20) calendar years and two (2) calendar months.

4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. The contents of the crimes and persons listed in Exhibits A and B shall remain sealed from public view until all of the individuals listed therein have been taken into custody or have had charges filed against them or until the State requests that the contents be made public.

5. Is is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

6. The parties agree that the State will not prosecute the defendant for the following crimes: those he will testify to which are mentioned in this agreement and listed in Exhibits A and B, which are a part of this agreement; those where the defendant's involvement is presently known to the police and the subject of police reports; those which are material to the direct testimony of the defendant in relation to the crimes listed in this agreement and Exhibits A and B; those crimes which the defendant has revealed to the State in transcribed statements and those presently filed and now pending against the defendant. The pending cases against the defendant in the Maricopa County Superior Court will be dismissed with prejudice at the time of sentencing. The defendant is to be severed in those cases from any other defendants.

7. The parties agree that the defendant will not testify to any of the matters referred to in this agreement until Judge Birdsall has accepted all the terms and conditions of this agreement.

8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.

9. The parties agree that in case of the resignation, death or incapacitating illness of the Judge assigned to this case, any Superior Court Judge assigned for that purpose by the Presiding Judge of Maricopa County may sentence the defendant in accordance with the terms of this agreement and is thereby bound by the terms of this agreement.

10. All parties agree that the sentencing of the defendant may be in any courthouse in any county seat or any other place designated by the sentencing Judge in the State of Arizona in accordance with Arizona Rules of Criminal Procedure and A.R.S. Sec. 12-130(C).

11. The parties agree that the defendant will not appeal from the judgment and sentence entered herein except as may be necessary to recompute his sentence to insure that he be incarcerated not longer than twenty (20) calendar years and two (2) calendar months. If the defendant appeals from this plea agreement except as noted herein, this plea agreement shall be null and void, and all original charges are automatically reinstated.

12. It is understood by all parties at this time, and at all times in the past, that the only party with full authority to enter into any plea negotiations with the defendant herein has been William J. Schafer, III, of the office of the Arizona Attorney General, and that any offers alleged to have been tendered by any member of the office of the Maricopa County Attorney and specifically Donald W. Harris, were made without authority. It is specifically denied by counsel for the defendant that Donald W. Harris ever made any firm offer of ten (10) years actual incarceration to the defendant John Harvey Adamson in exchange for a plea of guilty.

13. The parties agree that any Federal immunity from prosecution will be in accord with the document filed by the U.S. Attorney with the Court this date.

14. The parties agree that the defendant will serve the agreed upon sentence in a prison outside the State of Arizona.

15. In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement.

16. That unless the plea is rejected or withdrawn, the defendant hereby gives up any and all motions, defenses, objections, or requests he has made or raised, or could assert hereafter, to or against the Court's entry of judgment and imposition of sentence upon him consistent with this agreement.

17. That the defendant understands the following rights and understands that he gives up such rights by pleading guilty:

a. His right to a jury trial;

b. His right to confront the witnesses against him and cross-examine them;

c. His right to present evidence and call witnesses in his defense, knowing that the State will compel such witnesses to appear and testify;

d. His right to be represented by counsel (appointed free of charge, if he cannot afford to hire his own) at the trial of the proceedings; and

e. His right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.

18. The defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.

APPENDIX B

Letter dated April 3, 1980, from Petitioner's Attorney to Attorney General's Office

Stanley L. Patchell, Esq.
Assistant Attorney General
Arizona State Capitol Building
Phoenix, Arizona 85007

Re: State of Arizona vs. John Harvey Adamson

Case No. CR-93385

Dear Stan:

I am writing to confirm our telephone conversation of April 2, 1980 wherein we discussed the availability of John Adamson for interviews in preparation for his testimony in the trials of the State of Arizona vs. James Robison and Max Dunlap.

As I advised you by phone, I have met with John Adamson at his place of incareration [sic] along with my law partner, Greg Martin. We had lengthy discussions revolving around his expected testimony as well as the plea agreement that he had entered into with the State of Arizona in the above-referenced case number. Further, at that time I also delivered to Mr. Adamson a complete set of transcripts of his testimony in the trial of James Robison and Max Dunlap that was previous held.

After lengthy discussions and consideration of all of the various aspects of this case and the potential ramifications to Mr. Adamson, I can advise you of the following matters:

1. John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona.

2. John Harvey Adamson is well aware of the fact that he can be subpoenaed by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called to the stand does not mean that he must testify. He does understand that he may be directly ordered by the Court to testify and, if he refuses do so, may be held in contempt by the Court.

3. John Harvey Adamson is further fully aware of the fact that your office may feel that he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

4. If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met:

a. The State of Arizona will agree that, upon his completion of his testimony, John Harvey Adamson will be released from custody immediately. The testimony referred to herein is, of course, testimony in an additional

trial of the State of Arizona vs. Max Dunlap and possibly, testimony in a separate trial of the State of Arizona vs. James Robison. If separate trials are held, Mr. Adamson's demand for his immediate release will apply to the completion of his testimony in whichever trial goes first. This demand is not to be considered to be contingent upon any verdict being reached in either case.

b. If the State agrees to the first condition, an additional condition will be that when John Harvey Adamson is transported to Maricopa County for his testimony in the above-referred trial, that he will not be held in a facility of the Maricopa County Jail or the Maricopa County Sheriff's Department. It is his demand that he be held in a non-jail facility with the agreement that there will be full time, that being 24-hour, protection by some law enforcement agency, preferably the U.S. Marshal's office, for Mr. Adamson's safety.

c. As a further and separate demand, John Harvey Adamson wishes to have a complete clothing outfit prior to his testimony in any trial consisting of a new suit, new shoes, socks, etc.

d. Mr. Adamson further demands that if his testimony is going to be requested by the State, his ex-wife Mary and his son be provided with protection until such time as Mr. Adamson is released from custody. Further, Mr. Adamson requests that an educational fund be set up for his son.

e. Mr. Adamson further demands that, upon his release from custody, he will be provided with suitable transportation and funds in order for him to travel to a location outside of the State of Arizona to set up a new identification and life for himself. It is anticipated that the

State will work through the U.S. Attorney's office and the U.S. Marshal's office in an attempt to comply with this demand.

f. Further, John Harvey Adamson demands that, prior to any further testimony and/or interviews, he be provided with full and complete immunity for any and all crimes in which he may have been involved.

The above basically describes what Mr. Adamson's demands are for his future testimony in any case involving James Robison or Max Dunlap. As we have discussed many times in the past with Bill Schafer, the crimes for which John Adamson requires immunity in order to fully and completely answer any cross-examination by defense counsel, are not of such a nature that the State would be shocked for the State to extend immunity for those crimes. Further, I can represent that any immunity involved as far as any homicide case would be concerned would be an immunity from prosecution for any indirect, and unknowing, participation in any homicide.

By this letter, it is represented to you that John Harvey Adamson has not been directly involved in any actual homicide outside of the Don Bolles killing.

Again, I would like to re-emphasize the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all of his obligations under the plea agreement. The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing. It is further

our position that, without some type of stipulation, a Superior Court Judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence.

I look forward to hearing from you in the near future.

Very truly yours,

MARTIN & FELDHACKER

/s/ William H. Feldhacker

WHF:ir
CC/John Harvey Adamson

APPENDIX C

Letter dated April 9, 1980, from the Attorney General's Office

Mr. William H. Feldhacker
Attorney at Law
1045 East Bethany Home Road
Phoenix, Arizona 85014

Re: JOHN HARVEY ADAMSON

Dear Mr. Feldhacker:

In regard to the requested testimony of John Harvey Adamson in the forthcoming retrial (or retrials) of Dunlap and Robison, the position of the state is as follows:

1. The January 15, 1977, plea agreement between the state and John Adamson is still in effect. Because of this the state has the right to call upon Mr. Adamson for testimony and for interviews.

2. On April 9, the state did call upon Mr. Adamson, through you, for an interview regarding his testimony at the trial. As Mr. Adamson's attorney you refused to allow him to be interviewed.

3. Such a refusal by Mr. Adamson is a violation of the plea agreement. Because of such a refusal, the state may now institute proceedings necessary to carry into effect those things noted in the plea agreement that result from a violation by Mr. Adamson. Specifically those things include: reinstatement of the first degree murder charge against Mr. Adamson for the murder of Don Bolles and its possible punishment of death; reinstatement of all other criminal charges that were dismissed pursuant to the plea agreement; withdrawal of the state's request of the federal government to assume custody of Mr. Adamson.

Mr. Adamson should also be aware that in addition to these things that flow directly from his breach of the plea agreement the state may also institute criminal actions that were not discussed as part of the plea agreement.

In an effort to resolve this question, a deposition of Mr. Adamson has been set by Judge French for 12:30 p.m. on April 10 in the conference room of the United States Attorney's Office at the Federal Building in Phoenix.

Sincerely,

ROBERT K. CORBIN
Attorney General

/s/ William J. Schafer, III
WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

WJS/fn
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BRUNETTI, Circuit Judge, with whom Circuit Judges KENNEDY, ALARCON and BEEZER join, dissenting:

Adamson has no valid double jeopardy defense to his prosecution for first degree murder, therefore I respectfully dissent.

1. *Background.*

John Harvey Adamson was charged with first degree murder in connection with the bombing death of Donald Bolles in Phoenix, Arizona. His first degree murder trial had commenced and was in the process of jury selection when Adamson and his attorneys struck a plea agreement with the district attorney whereby Adamson agreed to provide testimony against certain individuals, including James Robison and Max Dunlap, with regard to the murder of Donald Bolles, and to plead guilty to a charge of second degree murder. The plea agreement provided that Adamson would receive a sentence of 48-49 years imprisonment, with a maximum of 20 years, two months to be served, and that other charges pending against him would be dismissed.

The plea agreement was submitted to Arizona Superior Court Judge Birdsall for approval. At a formal

hearing, the judge reviewed each detail of the plea agreement with Adamson, approved the agreement, and the first degree murder trial was suspended. The plea agreement provided for deferred sentencing; accordingly, the sentencing hearing was conducted without review of the details or consequences of the plea agreement.

2. *Adamson's Double Jeopardy Claim.*

A review of Adamson's double jeopardy claim[1] must acknowledge the "unique nature of the double jeopardy guarantee as compared to other constitutional rights." *United States v. Young*, 544 F.2d 415, 418 (9th Cir.), *cert. denied*, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 626 (1976). A double jeopardy claim implicates the "very power of the State to bring a defendant into court," and thus is collateral to, and separable from, those constitutional claims which pertain to a determination of the principal issue at trial, i.e., whether or not the accused is guilty of the offense charged. *Abney v. United States*, 431 U.S. 651, 659, 97 S.Ct. 2034, 2040, 52 L.Ed.2d 651 (1977). Accordingly we have held that a plea of guilty to a charge brought in violation of the double jeopardy clause does not waive a double jeopardy defense. *Launius v. United States*, 575 F.2d 770, 771 (9th Cir.1978).

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1. The double jeopardy issue was not raised by Adamson in the district court or his appeal from the district court, but was raised for the first time in this habeas corpus proceeding in appellant's Supplemental Brief on Rehearing En Banc. The double jeopardy defense had been previously rejected by this court in a prior habeas corpus proceeding. *See Adamson v. Hill*, 667 F.2d 1030 (9th Cir., 1983), *cert. denied*, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982).

Whether a double jeopardy defense may be waived is a question this circuit has yet squarely to address. The Supreme Court has declined to hold that a double jeopardy claim may never be waived. *Menna v. New York,* 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975). The majority of sister circuits that have considered the question have concluded that a double jeopardy defense may be waived. *See, e.g., United States v. Broce,* 753 F.2d 811, 822 (10th Cir.1985) (double jeopardy claim may be waived by "an informed and intentional relinquishment specifically of . . . rights under the Double Jeopardy Clause of the United States Constitution"); *Brown v. Maryland,* 618 F.2d 1057, 1058 (4th Cir.) (by pleading guilty after entering into a favorable plea bargain, defendant waived his right to be free from double jeopardy), *cert. denied,* 449 U.S. 878, 101 S.Ct. 224, 66 L.Ed.2d 100 (1980); *McClain v. Brown,* 857 F.2d 389, 391 (8th Cir.1978) (a bar to further prosecution because of former jeopardy is not a jurisdictional defect, but a defense or personal right which must be affirmatively pleaded or is considered waived); *United States v. Perez,* 565 F.2d 1227, 1232 (2d Cir.1977) (the constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived); *United States v. Wild,* 551 F.2d 418, 424-25 (D.C.Cir.) (constitutional rights which the defendant may waive include the right not to be twice put in jeopardy), *cert. denied,* 431 U.S. 916, 97 S.Ct. 2178, 53 L.E.2d 226 (1977); *United States v. Buonomo,* 441 F.2d 922, 924 (7th Cir.) (constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded at trial will

be regarded as waived), *cert. denied,* 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81 (1971).

Notwithstanding *Menna* and our decision in *Launius,* it is certain that the double jeopardy bar is not absolute. This is nowhere more apparent than in the context of a retrial following a mistrial. Where a mistrial has been declared without the defendant's request or consent, a new trial may take place so long as there existed a manifest necessity for the mistrial. *Illinois v. Somerville,* 410 U.S. 458, 461, 93 S.Ct. 1066, 1069, 35 L.Ed.2d 425 (1973). Similarly, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States v. Jorn,* 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971). This principle reaches its limits in permitting retrial following an unnecessary mistrial, declared without the defendant's request or express consent, if the defendant's statements or silences constitute an implied consent. *See United States v. Smith,* 621 F.2d 350, 351 (9th Cir.1980), *cert. denied,* 449 U.S. 1087, 101 S.Ct. 877, 66 L.Ed.2d 813 (1981).

The mistrial exceptions to the double jeopardy bar clearly refute the notion that the bar is absolute. The Supreme Court in *United States v. Dinitz,* 424 U.S. 600, 609 n. 11, 96 S.Ct. 1075, 1080-81, n. 11, 47 L.Ed.2d 267 (1976), has stated that a defendant's double jeopardy guarantee against multiple prosecutions may be *served* by a mistrial declaration, and that the permissibility of retrial in such cases does not depend on a waiver of the defendant's double jeopardy right. In certain cases a second prosecution may follow the midtrial dismissal of an indictment without running afoul of the double jeopardy clause. *See Lee*

v. United States, 432 U.S. 23, 30, 97 S.Ct. 2141, 2145-46, 52 L.Ed.2d 80 (1977).

An exception to the double jeopardy bar pertinent to Adamson's case is described in *Jeffers v. United States,* 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977). In *Jeffers,* the defendant elected to be tried separately on greater and lesser included offenses. Although a subsequent trial on a greater offense following trial on a lesser included offense is, as a general rule, prohibited by the double jeopardy clause, *see Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the *Jeffers* Court found that the defendant's election deprived him of a double jeopardy defense to the second trial. 432 U.S. at 152, 97 S.Ct. at 2217. The *Jeffers* Court did not speak of "waiver"; rather, the Court concluded that no violation of the double jeopardy clause had occurred. The second trial fell within an exception to the *Brown* rule, based on the defendant's role in bringing about the second trial.

This view of the double jeopardy clause was expanded and strengthened in *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), where the Court found permissible a second trial on two counts that had been dismissed in midtrial at the defendant's behest. The Court concluded that the policies underlying the double jeopardy clause do not extend "to include situations in which the defendant is responsible for the second prosecution." *Id.* at 96, 98 S.Ct. at 2196-97. Again the Court declined to adopt a "waiver" analysis, stating that "the double jeopardy clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 99, 98 S.Ct. at 2198.

3. *Adamson Knowingly Waived His Fifth Amendment Double Jeopardy Rights.*

There is no presumption of acquiesence in the loss of fundamental constitutional rights. The courts indulge in every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Id.*

On January 15, 1977, Adamson and his three court-appointed attorneys appeared in open court before Arizona Superior Court, Judge Birdsall. Judge Birdsall reviewed the plea agreement with Adamson paragraph by paragraph, and at times, word by word. Adamson intentionally waived his double jeopardy rights when he accepted the totality of the plea agreement negotiated by his three attorneys. It is clear from the record that Adamson knew the circumstances confronting him and the consequences of entering into the plea agreement. Accordingly, his acceptance of the agreement constituted a waiver of all conflicting rights existing at that time.

The record shows the following: On January 15, 1977, Adamson was on trial as the defendant in Case No. CR 93385, Maricopa County, *State of Arizona v. John Harvey Adamson,* under a charge of open murder for the killing of Donald Bolles. On January 15, 1977, at a time set for continuing the voir dire examination of jurors in the case, the defense and the State of Arizona announced to the court that they had reached a plea agreement and the document with two sealed exhibits, Exhibits A and B, were presented to the court. Exhibits A and B were referred

to in, and were part of, the plea agreement. The exhibits were unsealed and Adamson signed each exhibit in open court whereupon the exhibits were replaced in their respective envelopes and sealed. The signatures of Adamson, his three attorneys and the two attorneys representing the State of Arizona were on the plea agreement.

The judge established that Adamson had four years of college education, never had any mental illness or disease, and was not under the influence of drugs or alcohol. Adamson acknowledged that his signature was on page 5 of the original plea agreement and that he had reviewed the agreement with all three of his counsel.[2] Judge Birdsall told Adamson that he initially plead not guilty to the charge that he murdered Donald Bolles on or about June 2, 1976 in Maricopa County, Arizona, and now by virtue of the plea agreement he was agreeing to plead guilty to murder in the second degree. Judge Birdsall reviewed the nature of murder in the second degree, and then in detail reviewed each paragraph of the plea agreement with Adamson, receiving acknowledgements from Adamson that he understood each plea agreement provision. Adamson acknowledged that he understood that by entering a guilty plea he was giving up his constitutional rights of a speedy public trial by a jury, (his trial being into the third week and in the process of jury selection), the confrontation of witnesses, the presentation of evidence on his own behalf,

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2. The judge asked "At this point do you believe you understand the provisions of the plea agreement?" Adamson answered "Entirely sir." The judge then asked Adamson "Do you have any questions that you want to ask me about before we go any further?" and Adamson answered "No sir." Transcript, Change of Plea, January 15, 1977, at 7.

the right to compel attendance of witnesses, the right to be represented by counsel, and the right to remain silent.

Judge Birdsall reviewed paragraph 5 of the plea agreement with Adamson word for word.[3] He explained to him that one of the provisions of that paragraph was that should Adamson refuse to testify or at any time testify untruthfully concerning the crimes mentioned in the agreement, then the agreement would become null and void, and he would be subject to the charge of open murder. Adamson was told that if he was charged and found guilty of first degree murder, he would be subject to the penalty of death or life imprisonment requiring a mandatory twenty-five years of actual incarceration. Adamson stated that he understood what would happen if for any reason the agreement became null and void and the open murder charges were reinstated. As a result of understanding and agreeing to that provision, Adamson with the advice of his attorneys, accepted the totality of the plea agreement and the benefits derived therefrom in exchange for the rights and powers he had relinquished as

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3. Paragraph 5 of the plea agreement provides: It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

set forth in the agreement. Each of the parties had now recast their legal status, and their respective rights and powers, into the terms of the integrated plea agreement which set forth their new rights and powers, including the enforcement provisions of paragraph 5.

At the conclusion of the plea agreement review Judge Birdsall read Adamson's, his attorneys' and the state prosecutors' acknowledgements of the agreement into the record.[4] All the parties confirmed their signatures and acknowledgements. Judge Birdsall then requested Adamson to establish a factual basis for his plea of guilty to the crime of murder in the second degree, whereupon Adamson related the facts of his participation in the killing of Donald Bolles. At this point Judge Birdsall confirmed that Adamson was satisfied with the legal representation of his three court appointed attorneys and that he had no complaints concerning the manner in which they had represented him as his attorneys.

The court deferred acceptance of the sentencing provisions in the plea agreement until it could receive and

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4. Adamson signed the following acknowledgement: "I John Harvey Adamson, have read this agreement with the assistance of counsel, understand its terms, understand the rights I give up by pleading guilty in this matter, and agree to be bound according to the provisions herein." Adamson's three attorneys signed the following acknowledgement: "We have discussed this case and the plea agreement with the defendant. We have advised him of his rights and the consequences of his plea, and we concur in his entry of this plea." The state prosecutors signed the following acknowledgement: "We have reviewed this agreement and agree on behalf of the State of Arizona that the terms and conditions set forth herein are appropriate and are in the interests of justice."

review a presentence report, and concluded by accepting the plea agreement and Adamson's plea to the charge of murder in the second degree.

On January 19, 1977, Judge Birdsall after having reviewed the presentencing report found that the provisions contained in the plea agreement regarding the sentence to be imposed upon Adamson were appropriate and that Adamson should be sentenced *strictly in accordance with the provisions contained in the plea agreement.* The sentencing date was to be subject to call, and the court set a review hearing in the matter for January 18, 1978, one year from the date of the hearing. All of the jurors were permanently excused and the case was recessed.

It is evident from a review of the record and of the entire plea agreement and exhibits that the purpose of the plea bargaining was for Adamson, with advice of counsel, to waive any rights he may have had at the time the plea agreement was entered into and to proceed in accordance with the terms of the agreement. He knowingly relinquished and abandoned his right to proceed with the open murder trial subject to the condition that if the agreement was breached and became null and void that the parties would be returned to the positions they were in before the agreement. If Adamson breached the agreement, he could again be subject to a first degree murder charge, but he would also reacquire the defenses he had waived, especially as to the incriminating statements he had given as part of the agreement. Adamson does not question the legal sufficiency of his counsel's advise [sic] regarding the legal rights he waived under this agreement. It is clear from the record that Adamson, with the aid of his attorneys, knowingly and willingly waived any defense

to being subjected again to a first degree murder charge (double jeopardy). Adamson accepted the integrated terms and operation of the plea agreement in exchange for the situation he found himself in at the time the agreement was entered into.

We now must analyze what Adamson received under the plea agreement and what the other parties to the agreement expected and to what they were entitled.

At the time the plea agreement was entered into, Adamson was on trial under an open murder charge for the killing of Donald Bolles. In addition, the state could have prosecuted Adamson for the crimes listed in Exhibits A and B to the plea agreement, crimes in which Adamson's involvement was then known to the police and subject to police reports, and crimes which Adamson had revealed to the state in transcribed statements. Also there were charges in other cases pending against Adamson and other defendants in the Maricopa County Superior Court. The state had the power to try Adamson for each of those crimes, and society and the victims of all those crimes had a legitimate expectation and an interest that the state would prosecute those crimes. The state surrendered that power, and society and the victims through the state gave up their expectations and interests in exchange for Adamson's plea of guilty to the charge of murder in the second degree for the murder of Donald Bolles, and further for Adamson's *promise* that he would testify fully and completely as required by the plea agreement. As a result of entering into the plea agreement, not only did Adamson eliminate the possibility of being found guilty of murder in the first degree in the pending trial, but he also obtained the state's agreement not to prosecute him for the crimes listed in Exhibits A and B and in paragraph 6 of the plea agreement.

The many serious actions and charges against Adamson which could have resulted in a death penalty or imprisonment for the rest of his life were dismissed with prejudice. Adamson bargained for, and received as a result of the second degree murder guilty plea, a sentence no longer than twenty calendar years and two months. Adamson obtained federal immunity from prosecution and was allowed to serve his sentence in a prison outside of the State of Arizona. In turn all that was required of Adamson was his truthful and complete testimony concerning crimes in which he admitted he was involved, and as to which he was obtaining immunity and freedom of prosecution.

To protect the rights of the state in the plea agreement, and to insure the value of Adamson's *promise* to testify, paragraph 5 of the plea agreement provided that, in the event he failed to testify or defaulted in the terms of the plea agreement, the plea agreement would bcome null and void and that all original charges would be reinstated.

To insure the mutual benefit and validity of the plea agreement justifying the removal of Adamson from the threat of the pending trial and all future charges and trials, Adamson waived the rights that would have precluded his being charged again and tried for open murder as a part of the mutuality of waiver of rights and powers that all parties agreed to in the plea agreement. The plea agreement redefined the rights and powers of the parties in an integrated contract. By entering into the plea agreement the parties waived any constitutional rights they may have had and substituted therefor the contractural terms and remedies. Any other interpretation renders the

plea agreement ineffectual and unenforceable from the inception.

4. *Adamson's First Degree Murder Conviction is the Consequence of his Voluntary Choice and is Not Invalidated by the Double Jeopardy Clause.*

The majority correctly notes that valid waiver of a constitutional right ordinarily requires that there be an "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The majority errs, however, in its implicit and fundamental premise that only a waiver could remove the double jeopardy bar to Adamson's retrial. The foregoing review of exceptions to the double jeopardy bar should dispel the notion that waiver is an invariable prerequisite to a valid second trial where jeopardy has once attached. Indeed, *Jeffers v. United States,* 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977), turned on this very point, and, I believe, disposes entirely of Adamson's double jeopardy claim.

In *Jeffers,* as in *Adamson,* the two prosecutions were for a greater and lesser included offense. The defendant in *Jeffers* sought to have the greater and lesser included offenses tried separately. The Court concluded that the defendant's role in bringing about the successive trials removed any constitutional barrier to the second prosecution. *Id.*

This essentially is Adamson's case. Jeopardy attached upon Adamson's entry of a guilty plea. *See United States v. Vaughan,* 715 F.2d 1373, 1376 (9th Cir. 1983). By entering into the plea agreement, Adamson elected the lesser included offense—second degree murder. The only difference

from *Jeffers* is that there, a second prosecution on the greater offense was a certainty; for Adamson it was contingent upon his breach of the plea agreement. But this distinction is without constitutional significance, and in any event would seem to weigh in favor of the state in the case before us.

The *Jeffers* Court noted that "the considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges." 432 U.S. at 152 n. 2, 97 S.Ct. at 2217 n. 2. In other words, a different result might have been required had the government acted unilaterally to separate the trials, or if the defendant's voluntariness was compromised or otherwise at issue. Adamson does not seriously contest his voluntariness in entering into the plea agreement, and the state can hardly be held accountable for Adamson's admitted refusal to be interviewed in preparation to testify—the triggering event which, after all, set in motion the second prosecution. Adamson must accept responsibility for the second prosecution; the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott,* 437 U.S. 82, 99, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978).

The state's freedom from blame in the events leading to Adamson's retrial distinguishes this case from *Menna v. New York,* 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978). In *Menna,* the defendant was charged with an offense for which he had already served a sentence. Thus, the charge was one the state constitutionally could not prosecute. 432 U.S. at 62 n. 2, 96 S.Ct. at 242 n. 2. The

state had acted to place the defendant in double jeopardy; accordingly, the defendant's plea of guilty, which removed only the issue of factual guilt from the case, did not impair the defendant's legitimate double jeopardy defense. *Id.*

Similarly, in *Launius,* defendants pleaded guilty to a multiplicious [sic] information, and received consecutive sentences on two counts, exceeding the statutory maximum for the single offense charged. 575 F.2d at 771. The government was responsible for initiating proceedings in violation of the double jeopardy clause. The defendants' guilty pleas did not waive their double jeopardy rights. *Id.* at 772. In both these cases the double jeopardy violation was directly attributable to the government in the first instance.

Adamson, however, did not plead guilty to an indictment brought in violation of the double jeopardy clause. By the same token, the state did not attempt to redeem an otherwise invalid prosecution by bargaining for his guilty plea. The second prosecution sprung from the terms of the plea agreement itself. Adamson voluntarily agreed to those terms, precipitated his second prosecution, and should not now be heard to complain of the result.

Whether Adamson't actions are viewed as a waiver or as a voluntary choice, his double jeopardy claims fail.

5. *Adamson Knowingly and Intentionally Breached the Plea Agreement.*

There should be little doubt that Adamson breached his obligation when he expressly refused to provide interviews in preparation for his testimony in the retrial of Robison and Dunlap. The purpose of the plea agreement was to obtain Adamson's testimony concerning certain

crimes listed in the agreement and in Exhibits A and B and specifically with regard to the Robison and Dunlap trials, the defendants therein being charged with the murder of Donald Bolles. Unless Adamson's testimony as required by the plea agreement was obtained for the state there is no purpose for the plea agreement and for relieving Adamson of the charges and prosecutions listed in the plea agreement. The agreement at paragraph 5 required Adamson to testify truthfully and completely *at all times,* whether under oath or not, to the crimes mentioned in the plea agreement, including all *interviews,* depositions, hearings and trials. In paragraph 4 of the plea agreement Adamson agreed to testify fully and completely *when requested* by proper authorities. By his April 3, 1980, letter through his attorney, Adamson refused to provide requested pretrial interviews, in plain breach of his obligation.

I cannot agree with the majority's view that Adamson was merely advancing a reasonable interpretation of the plea agreement. The majority points to Paragraph 8, which states that Adamson would be sentenced "at the conclusion of his testimony in all of the cases," as the only unambiguous language in the plea agreement regarding the point at which Adamson's obligation to testify would terminate. This language cannot be interpreted out of context and does not bear the construction the majority places upon it. It does not support the view that, by sentencing Adamson, the state relieved him of his duty to testify. The totality of the plea agreement suggests, and common sense demands, that Adamson was required to testify in the Dunlap and Robison trials whenever called upon to do so.

Paragraph 8 of the plea agreement provides "All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at

the conclusion of his testimony in all of the cases referred to in this agreement and in *Exhibits A and B,* which accompany it." (Emphasis added). Adamson argues that because he was sentenced before the retrial of the state's cases against James Robison and Max Dunlap he had no obligation under the plea agreement to testify at the retrial of those two cases. Adamson is incorrect in his contention and the record contains substantial evidence clearly supporting the conclusion that he knowingly and intentionally breached the plea agreement.

Adamson's attorney, William H. Feldhacker,[5] wrote a letter to the Assistant Attorney General on April 3, 1980, (Appendix B to the majority opinion) stating that he and his law partner had met with John Adamson, and that after lengthy discussions and considerations of all the various aspects of the case and potential ramifications to Mr. Adamson, he was advising the Attorney General of the following matters contained in the letter. The letter stated, "*John Harvey Adamson believes* that he has fully complied with and completed his plea agreement entered into with the State of Arizona. It is, therefore, *his* position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of *further consideration* by the State of Arizona." (Emphasis added).

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5. One of the same three attorneys that appeared for Adamson at his trial, the change of plea hearing and the sentencing hearing.

The reason for the letter is apparent from its first paragraph wherein it confirmed telephone discussions between the state attorneys and Adamson's attorneys as to the availability of Adamson for interviews in preparation for his expected testimony in the retrials of the State of Arizona against James Robison and Max Dunlap. Interviews are clearly and explicitly stated as one of Adamson's obligations in the plea agreement. Throughout the letter the wording establishes that the statements are communications from John Adamson through his attorney to the state. "John Harvey Adamson is well aware of the fact that he can be subpoenaed . . . by your office to appear as a witness in any criminal matter, however, he is further aware that the fact that he may be called to the stand does not mean he must testify" (paragraph 2); "John Harvey Adamson is further fully aware of the fact that your office may feel he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him" (paragraph 3); "If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met." (Paragraph 4). And then Adamson listed his demands.

Adamson's attorneys do not render their opinion as to whether Adamson's position is correct or reasonable—only that Adamson had taken a position. The language of the letter is carefully couched in this regard. The second sentence in the last paragraph states that "The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing."

What the plea agreement states is controlling, not what Adamson at the moment of breach alleges was anticipated.

The plea agreement defines the time for sentencing, but it does not set the time for an absolute conclusion of Adamson's duty to testify. Paragraph 18 of [sic] plea agreement states that Adamson was to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which Adamson agreed to testify. That paragraph does not limit his duty to testify only to such time that he remains in the custody of the Pima County Sheriff. The plea agreement and the sentence had been accepted by Judge Birdsall and there remained only a ministerial act of a sentencing hearing to complete the imposition of the sentence fixed by the plea agreement. Adamson's change in status with the Pima County Sheriff and the sentencing only changed the place of his incarceration. That ministerial act of sentencing did not change nor could it change his guilty plea, or the acceptance of a guilty plea by the court, or the terms of the plea agreement including the sentence fixed by the plea agreement. When the plea agreement was finally accepted by the judge he stated "The defendant will be sentenced strictly in accordance with the provisions contained in the plea agreement."[6] The sentencing date was set by Judge Birdsall at that time for January 18, 1978, in accordance with his policy and practice not to leave any criminal case sentencing date on a subject to call basis.

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6. Case No. CR-93385, *State of Arizona v. John Harvey Adamson, January* 19, 1977 Transcript, Wednesday, 10:00 a.m., before Judge Birdsall, page 37, lines 13-15.

The procedure in paragraph 8 waived the time for sentencing and set a time for sentencing not for setting a conclusion on Adamson's duty to testify or retestify in a retried case. This subject was discussed with Adamson and all attorneys by Judge Birdsall at the change of plea hearing on January 15, 1977. Judge Birdsall apprised Adamson that he was entitled under the Arizona Rules of Criminal Procedure to be sentenced within ninety days from the acceptance of his plea agreement and that pursuant to the agreement he was waiving the time for sentencing.

The record establishes that Adamson's continuing obligation to testify, before and after sentencing, was known and understood by Adamson and his attorneys. This is clearly set forth in the dialogue at the December 7, 1978, sentencing hearing before Judge Birdsall in Case No. CR-93385. Adamson and his attorneys, Gregory H. Martin and William H. Feldhacker, were present, together with the Assistant Attorney General William J. Schafer III. As the court was proceeding with the plea agreement, the following was said:

> THE COURT: All right. The court's *sentencing is limited by the terms of the plea agreement which was entered in this case,* which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance *with that plea agreement.* Do you have anything Mr. Schafer?
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> MR. SCHAFER: Yes, I would like to add one thing. I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necssary in the future to bring Mr. Adamson back *after sentencing for further testimony.*

THE COURT: The record may show that.

MR. FELDHACKER: That's our understanding.

MR. MARTIN: That's correct.

Transcript at page 43. (Emphasis added).

Adamson was then sentenced.

It is Adamson's position at this time that his former attorneys have sworn that the "further testimony" involved a wholly separate case than the Bolles murder case, and arising out of the arson of the *Ashford Plumbing Company* in Phoenix, Arizona. *See* page 3 n. 2 Appellant's Supplemental Brief on Rehearing En Banc. In fact, that "further testimony" is testimony contemplated by and included specifically in the plea agreement, the *Ashford Plumbing Company* case being one of the cases listed in Exhibits A and B to the plea agreement. Adamson's counsel, William Feldhacker, in his argument of Adamson's petition for special action before the Arizona Supreme Court on May 28, 1980, appeared with Adamson's other former attorney, Glen [sic] Martin. Mr. Feldhacker stated to the court his explanation of the colloquy between counsel at the sentencing hearing before Judge Birdsall regarding the "further testimony." He told the Arizona Supreme Court that at the time of sentencing there was one case left which required Adamson's testimony, and it was from Exhibits A and B appended to the plea agreement, *State of Arizona versus Ashford.* He admitted to a conversation with Mr. Schafer discussing the *Ashford* case, in which he agreed that, if necessary Adamson may have to testify in that case.[7]

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7. The following conversation took place in the Arizona Supreme Court hearing:

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It is obvious that testimony after sentencing was contemplated by the clear language of the plea agreement and understood and intended by the parties. Adamson's anticipated testimony in the *Ashford* case after sentencing was not an addition to or amendment of the plea agreement by the parties, but was one of Adamson's obligations

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JUSTICE HAYS: Counsel, do you give any weight to that portion of the sentencing where I think Mr. Schafer indicated, Now have it clear for the final acceptance of this plea. We have it clear that Mr. Adamson testified some more—or something to that effect, and, *nobody seemed to object to that position.* I make this response. Was that understood? Does that have any weight, or does it mean—

MR. FELDHACKER: As to the meaning of that, Your Honor—I think that was on December 7, 1978—I believe I have in my notes—I have that there was a discussion of that. I don't think it's as clear as Your Honor stated, but it's clear that it's undestood that it happened.

What happened was that we were asked if there was any legal cause for Mr. Adamson not to be sentenced. We certainly stated there was none. Mr. Schafer said, Yes, I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, that *it may be necessary in the future to bring Mr. Adamson back after sentencing for further evidence.* The record may show that; and I stated, That's our understanding.

Subsequently there was one case left from *exhibits A and B that were appended to that plea agreement, and that case left was State of Arizona versus Ashford.* It's a case that was under investigation. It's basically—I would submit from my conversation with Mr. Schafer—a case that they concluded they would never be able to actually put together and prosecute. However, Mr. Schafer discussed it with us—about the Ashford case; about the fact that, you know, *we had that in the agreement; that, if necessary, he may have to testify in that case.*

Adamson v. Superior Court, No. 14898, Transcript of Proceedings, May 28, 1980, commencing at page 6, line 21. (Emphasis added).

required by the plea agreement, acknowledged by Adamson, Adamson's counsel and the state at Adamson's sentencing hearing on December 7, 1978. Adamson can not assert a reservation for refusal to further testify after sentencing in the *Robison* and *Dunlap* Bolles murder cases, and at the same time acknowledge an obligation to testify in the *Ashford* case after sentencing. The plea agreement makes no such distinctions.

Adamson, in an attempt to take a negotiated advantage as a result of the reversal of the *Robison* and *Dunlap* cases refused to testify. He attempted to better his position but also took the risk of the refusal to testify. His position at the same time frustrated the state's prosecution of *Robison* and *Dunlap* cases and destroyed the very essence of the plea agreement. Adamson never raised the defense of double jeopardy during the time when he was receiving the benefits guaranteed to him by the plea agreement. However, when the Arizona Supreme Court held that Adamson had breached the plea agreement by refusing to testify, and vacated the second degree murder conviction and sentence and reinstated the open murder charge,[8] Adamson then asserted the position that the plea agreement violated his double jeopardy rights.[9] In fact, those

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8. *Adamson v. Superior Court,* 125 Ariz. 579, 583, 584, 611 P.2d 932, 936, 937 (1980).

9. It was at this point that Adamson filed his first Petition for Writ of Habeas Corpus in the district court which was dismissed on September 26, 1980. Adamson then appealed that order to this court claiming that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the district court rested on erroneous interpretations of the plea agreement, and that he was

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rights were waived when he entered into the plea agreement, and the reinstatement of the first degree murder charge was the consequence of his voluntary choice and excepted from the double jeopardy defense, as fully discussed *supra.*

In order to escape a possible first degree murder conviction in the trial which was pending at the time of the plea agreement, Adamson accepted all the benefits the state was willing to give for his testimony. Then when faced with further testimony in the *Robison* and *Dunlap* cases he attempted to compound his benefits, with further detriment to the state, for the "additional testimony" which was in fact fully contemplated by the plea agreement. The plea agreement and the statements Adamson gave in connection with the plea agreement ostensibly set forth all of the crimes which he was willing to reveal and obtain dismissal and immunity for. However, in paragraph 4(f) of his demand letter of April 3, 1980, Adamson demands further immunity for *any and all crimes* in which

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denied due process for failure of the courts to hold a full evidentiary hearing to determine that material facts surrounding the breach of the plea agreement. In unpublished Memorandum No. 80-5941 this court on November 30, 1981 affirmed the district court dismissal of Adamson's habeas corpus petition, and upheld the Arizona Supreme Court and federal district court interpretation that Adamson had breached the plea agreement by refusing to testify, and that the plea agreement did not contemplate renegotiation in the event of a retrial. This court further held that Adamson's double jeopardy rights had not been violated, and that due process did not require an evidentiary hearing. *Adamson v. Hill,* 667 F.2d 1030 (9th Cir., 1981) *see* page 5 n. 4. The United States Supreme Court denied certiorari on March 1, 1982, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853.

he may have been involved. This is a request for more protection when the state is still only trying to obtain what it had originally had [sic] bargained for; testimony with regard to the Donald Bolles murder and the other crimes listed in the plea agreement.

After Adamson proceeded in breach of the agreement, the sequence of events that followed was entirely predictable; indeed, the outcome was specified by the plea agreement. Because the results of Adamson's breach were fully contemplated and determined by the plea agreement, it should be upheld by this court.

6. *Prosecutorial Vindictiveness.*

I would also reject Adamson's claim that his second conviction violates due process because it is the product of prosecutorial vindictiveness.

In advancing this claim, Adamson relies primarily on the Supreme Court's decision in *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The Court in *i lackledge* held that due process forbids a prosecutor from bringing increased charges in retaliation to a defendant's exercise of a constitutional right. *Id.* at 27-28, 94 S.Ct. at 2102-03. The prohibition against prosecutorial vindictiveness does not require evidence that retaliatory motivation actually existed; rather, it is to the appearance of vindictiveness that the prohibition is directed. The underlying policy is to insure that apprehension of retaliation does not deter a defendant's exercise of the right to appeal or to collaterally attack a first conviction. *Id.* at 28, 94 S.Ct. at 2102-03.

The problem for Adamson is that he can point to no exercise of a constitutional right that precipitated his second prosecution on an increased charge. Indeed, the

retrial came about because of his breach of a plea agreement. Because there had been no exercise of a constitutional right, the *Blackledge* "presumption of vindictiveness," and the policy underlying it, does not apply.

Although Adamson invoked his fifth amendment rights when he refused to testify at a pretrial hearing in the Dunlap and Robison retrials, this exercise of a constitutional right was wholly unconnected to his reprosecution. Adamson had acted in breach of the agreement by his letter of April 3, 1980. The state, by its letter of April 9, 1980, had already indicated that it considered that Adamson had breached the agreement, and his breach permitted reinstatement of the original charges and Adamson's original defenses.

The prosecutor's freedom to seek increased charges is vital to the integrity of the plea bargaining process, and is well supported by case law. The Supreme Court in *Bordenkircher v. Hayes,* 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978), held that a prosecutor properly could use the threat of increased charges to secure a plea agreement. This is exactly what happened in Adamson's case. The prospect of a first degree murder charge induced Adamson to plead guilty to second degree murder and to promise to testify against Robison and Dunlap and as further specified in the plea agreement. The agreement provided for reinstatement of the first degree murder charge in the event of breach.

It is totally unreasonable and senseless to suggest that the prosecutor could fairly strike a bargain with a

first degree murder reinstatement provision, but that prohibitions against prosecutorial vindictiveness prevent his carrying it out.

The evidence supported the first degree murder charge against Adamson, and society and the victims had a legitimate interest in seeing that charge filed and pursued. In view of the especially savage Bolles murder contract it would have been amazing if the prosecutor had filed anything else. There is no vindictiveness evident in the prosecutor's intent to retry Adamson. The intent to retry arose long before Adamson refused to testify as it was included in the paragraph 5, reinstatement provision of the plea agreement. Allowing Adamson to decide whether or not he should breach the plea agreement or to challenge it constitutionally, and once having lost the challenge to again volunteer to perform the plea agreement makes the reinstatement clause totally illusory. This gives Adamson the unilateral right to defeat the substance and value of the plea agreement. The threat of the death penalty against Adamson was necessary to insure performance of Adamson's *promise* that he would testify in accordance with the plea agreement. In any trial or retrial once the trial court swears and seats the jury and the trial proceeds double jeopardy attaches as to that specific defendant. *Crist v. Bretz,* 437 U.S. 28, 29, 98 S.Ct. 2156, 2157-58, 57 L.Ed.2d 24 (1978). If at that point Adamson takes the stand and asserts the Fifth Amendment, which he had the power (not the right) to do under the plea agreement, then the *Dunlap* or *Robison* cases or any other case in which he was to testify cannot be prosecuted. Adamson in fact did that and caused that exact result with his breach letter of April 3, 1980. In fact, in paragraph 2 of his letter he evidenced his threat that he could not be made to testify.

At that point a contempt citation did not bother Adamson. The heart of the plea agreement is the default clauses, paragraphs 3, 5, 11 and 15, containing the reinstatement of open murder charges to prevent Adamson from unilaterally defeating the agreement. Adamson's testimony and credibility were crucial to the conviction of Dunlap and Robison. *See State v. Robison,* 125 Ariz. 107, 608 P.2d 44, 45 (1980). Adamson's unilateral nonnegotiable demands for his testimony in the retrials destroyed his credibility and the state acted without vindictiveness and appropriately under the agreement to reinstate the open murder charges.

7. *The Improper Reinstatement of the Second Degree Murder Conviction and Sentence.*

The majority erroneously reads Paragraph 5 in isolation and concludes that under its provisions Adamson's breach would result only in voiding the executory agreement but would have no effect on the second degree murder judgment of conviction and sentence. To the contrary. Paragraph 15, by its very term applies where the agreement has been voided, and requires that the parties be returned to their positions prior to agreement. Thus the majority's view that the conviction and sentences somehow would survive is refuted by a plain reading of the agreement itself. To leave Adamson with a second degree murder conviction based on his guilty plea, and with a sentence meted out precisely according to the terms of the agreement, would hardly return him to his position before the agreement.

Adamson cannot again be tried for first degree murder, the plea agreement has been made unenforceable and

worthless by the majority opinion, and the parties are left with the scattered remains of all the proceedings which have transpired.

Reinstatement of the second degree murder judgment and sentence is not before this court. The majority, however, having freed Adamson from the death penalty, attempts to prevent his release by imposing upon the Arizona Supreme Court the burden of *reinstating* the second degree murder conviction within six months. If for any reason the Arizona Supreme Court fails to reinstate the conviction within the six months, Adamson, who has admitted to the involvement in and commission of the crimes set forth in the plea agreement, will go free. Adamson's status may be in question if the Arizona Supreme Court is unable to reinstate the conviction until after six months. The Arizona Supreme Court's burden is further enhanced by the spectre of another double jeopardy attack based upon the reasoning of the majority opinion. I respectfully submit that the plea agreement was negotiated by the parties to avoid the complications and convolutions brought on by the majority's misinterpretation of the plea agreement, all as set forth in this dissent.

I would affirm the district court's denial of Adamson's petition for writ of habeas corpus.

KENNEDY, Circuit Judge, dissenting:

I concur in general in the dissent by Judge Brunetti and find compelling his demonstration that this defendant so well understood the mechanics of the plea bargain and the risks consequent from breach that the majority's requirement of double jeopardy waiver is pointless. With all respect, I submit the majority's analysis rests on other

explicit and implicit assumptions that are quite contrary to settled principles of double jeopardy law. I dissent separately to make clear the full extent of my disagreement with the analysis apparently adopted by a majority of the court.

As I explain further below, the principal error of the majority is its assumption that a conviction resting on a plea agreement protects the defendant against trial for a higher offense if the plea or the conviction on which it stands is properly set aside. I submit this is incorrect. The extent of double jeopardy protection when a guilty plea and conviction are set aside requires an inquiry into the grounds upon which they were set aside. If the conviction here could not stand by reason of a breach of the plea agreement, the defendant could be tried on the same charge or on a higher one, for the conviction rested on the plea alone, not a trial, and the plea was set aside by reason of the defendant's own default, not by the mere fiat of the state. The majority's first false premise is that there was a double jeopardy right to be waived; there was not. The second false premise is that express waiver was required; it was not. The third false premise is that the contract was not a waiver in itself; it was. I turn to a more detailed discussion of these matters.

To begin with, jeopardy may attach upon the entry of a guilty plea. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969). Guilty pleas are entered under such a variety of circumstances that a general rule is not easily stated, but I should

think that when a plea of guilty is accepted on the record and nothing remains but to pass sentence and enter the conviction, jeopardy attaches upon entry of the plea. *United States v. Cruz*, 709 F.2d 111, 112, 115 (1st Cir.1983) (holding jeopardy attached upon acceptance of the plea). Despite the majority's statement to the contrary, there were no conditions attendant upon acceptance of this plea, other than the terms of the written plea bargain itself. I would conclude that jeopardy attached upon entry of the plea. With this principle in mind, a major defect of the majority opinion becomes apparent. By the majority's reasoning, Adamson could have renounced the agreement a week after it was made and, as it holds double jeopardy had not been waived, he would have the same incredible immunity from the agreement's enforcement mechanism as the majority grants him because the conviction and sentence were entered.

The question becomes what jeopardy protection remained after the plea and conviction were set aside. The quality and degree of jeopardy protection derived from a conviction based on a voluntary plea must be confronted by the majority. When the plea or conviction based upon it is set aside and further proceedings commence, the authorities do not support the premise that prosecution for a greater offense is necessarily prohibited. Where a conviction is set aside, the protections of the double jeopardy clause are only in proportion to, not greater than, the risks assumed by the defendant in the former proceeding. As the plea does not put a defendant at risk of a determination of guilt for a higher offense, a charge for the higher offense may be reinstated when and if the plea or

its consequent conviction are set aside, absent, say, a circumstance in which the state somehow is entitled to set aside the plea but acts unilaterally and without cause to impose greater burdens on the defendant.

In *United States v. Barker*, 681 F.2d 589 (9th Cir. 1982), the defendant agreed to plead guilty to second degree murder. She successfully had the conviction set aside on a section 2255 motion, on the ground that she had not been adequately informed of the nature of the second degree murder charge. *Id.* at 590. Her retrial for first degree murder was held not barred by double jeopardy, because the court's acceptance of the plea to second degree murder did not constitute an implied acquittal of first degree murder. *Id.* at 590-92. As Judge Hug noted in his opinion for the court in *Barker*, the precedents are in full accord. *Klobuchir v. Pennsylvania*, 639 F.2d 966 (3d Cir.), *cert. denied*, 454 U.S. 1031, 102 S.Ct. 566, 70 L.Ed.2d 474 (1981) (where conviction of third degree murder set aside, double jeopardy did not bar trial for murder in the first degree, as the prior conviction rested on a plea, not a trial); *Hawk v. Berkemer*, 610 F.2d 445 (6th Cir. 1979) (after guilty plea and conviction of murder and dismissal of aggravated murder charge in state court, defendant's appeal in effect withdrew the plea and the original, more serious charge can be reinstated). The rule of *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is simply not controlling, though the majority assumes its applicability without discussion. That case discusses double jeopardy protections which stem from a plea and a conviction that remain in force, not a plea and conviction that are set aside. Here the state ordered the conviction vacated under terms agreed upon by

the defendant, and so acted on a clean slate. In *Brown* the prosecution attempted to proceed when the conviction on a lesser charge remained in force and unimpeached. Though I reject the fanciful notion that the rule of double jeopardy gives any help at all to the defendant in the face of the express terms of this plea bargain, even if those rules do apply, they do not support the result the majority reaches. The plain fact is there was no double jeopardy protection to waive if the plea and conviction were to be set aside by the defendant's own acts of default. Adamson not having undergone a trial on the merits and not having established innocence to the charge of murder in the first degree, the trial could and did proceed on the greater charges without offending constitutional principles.

We may turn next to examination of the waiver rules the majority applies to the case. Here too the court departs from controlling authority. Jeopardy is waived in a number of instances by the defendant's own actions, and no express waiver or admonition is required before the court finds the waiver to have taken place. If a defendant moves for mistrial and obtains it, jeopardy is waived though he was not forewarned of such a consequence. *United States v. Dinitz*, 424 U.S. 600, 609 n. 11, 96 S.Ct. 1075, 1080-81 n. 11, 47 L.Ed.2d 267 (1976). This same result occurs where a guilty plea is withdrawn or the conviction based upon it is set aside by reason of the defendant's action. *See United States v. Barker*, 681 F.2d 589 (9th Cir.1982) (defendant appeals plea-based conviction). The state can retry the defendant, and the authorities contain no requirement that he be forewarned of such a result. *See, e.g., United States v. Jerry*, 487 F.2d 600, 606 (3d Cir.1973) ("where a defendant by his own motion

causes the withdrawal of his guilty plea, he has waived his right not to be put in jeopardy a second time"). In the case before us, of course, the defendant was forewarned of the consequences attendant upon breach of the plea agreement. The agreement specifically set forth that the defendant could be retried for murder in the first degree if a breach of the agreement caused the conviction to be set aside, which, as I have demonstrated, is the law in any event.

The majority seems to proceed on the assumption that jeopardy did not attach until the sentencing hearing, and on the further assumption that the record was somehow confused by the colloquy respecting defendant's obligation to give further testimony. As I have indicated, jeopardy attached much earlier, upon acceptance of the plea; and, in any event, the protections of the double jeopardy clause do not extend where the defendant did not face a trial and a plea-based conviction is properly set aside. Beyond this, waiver is not required in any event. Prosecutors do not have to explain the mysteries of double jeopardy before entering into an enforceable plea agreement. The whole purpose of such agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deus ex machina, to drop the idea of double jeopardy and waiver into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms. The defendant well knew that he could

not be required to accept the enforcement terms of the plea agreement, and in this context the failure to advise him of his double jeopardy rights is quite beside the point. Indeed, if the phrase "double jeopardy" had been added to the litany of rights the defendant was asked to waive in the plea agreement, competent defense counsel most surely would have objected to it. For in truth the defendant was not waiving double jeopardy. Its protections would not apply in the event of the breach; and if the second degree conviction remained in force, the defendant was entitled to the protections of the double jeopardy clause. Had the conviction remained in force, there could have been no trial for newly discovered evidence, no new sentencing procedure, or no further trial to impose heavier burdens upon him. Any general waiver of double jeopardy simply would have confused the record.

I recognize that the state has raised certain questions by having entered the second degree conviction before the terms of the bargain were fulfilled, but whether that was in violation of the agreement or somehow excused the defendant's further performance is simply a state law issue, not a double jeopardy question. The critical issue in the case becomes whether the defendant's acts were in breach of the agreement. That issue is one of state law, nothing more. Its outcome depends on primary and historical facts, which we have no authority to determine. *See Cuyler v. Sullivan,* 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). Even if we did have authority to scan the state's finding that there was a breach of the agreement, there is ample support for it. The defendant agreed that the first degree charges could be reinstated for a breach, and nothing in the later proceedings changed that compact. When the defendant first

gave the state notice of his refusal to cooperate further, his own attorneys specifically noted the possibility that the state would interpret noncooperation as a breach. The defendant took a risk not without some attractions for him. He was serving a twenty-year sentence. If the state elected to try him for first degree murder, conceivably he might have won an acquittal. It is hardly surprising that one as depraved as Adamson would shrink from a breach of contract and a gamble on the results. The court errs in not recognizing his defiance for what it is.

Finally, the court papers over the consequences of its ruling by telling Arizona it need not set Adamson free if it can find some way to reinstate the second degree murder conviction. We cannot, of course, by our own authority order that conviction reinstated. The matter has not been argued to us, but it may be that under Arizona law reinstatement is not permitted. Given our erroneous double jeopardy ruling, there can be no retrial for first degree murder; given the Arizona court's final determination that the plea bargain was breached and its ruling that the second degree murder conviction should be vacated, it is not clear to me that as a matter of state law it can turn around and change its decision to accommodate our error. Though I intimate no views as to the outcome under Arizona law, it is not beyond possibility that as a result of our decision the defendant will walk free.

In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.